MELVILLE W. FULLER

DANIEL HD

AMERICAN BAR ASSOCIATION JOVRNAL

NOVEMBER 1941

THE LAW OF
FOODS, DRUGS AND COSMETICS

By

HARRY AUBREY TOULMIN, Jr., J.D., LITT.D. LL.D.

of the Bar of the United States Supreme Court
Member of the firm of Toulmin and Toulmin
Author of Toulmin's Trade Agreements and the Anti-Trust Laws

Verbatim Text of the Act and All Related Statutes
Complete Legislative History of the Act
Annotations of Decisions by the Courts
Regulations Promulgated by the Government
Opinions of the Attorney General of the United States
Rules of Practice Before Government Departments
Exhaustive Analysis of Decisions and Regulations
All Carefully and Scientifically Indexed
Kept to Date With Annual Cumulative Supplements

Colonel H. A. Toulmin, Jr.

The Federal Food, Drug, and Cosmetic Act affects almost every industry in America. Use this book and be prepared to advise your corporate clients.

ONE LARGE VOLUME—$17.50

SEND FOR DESCRIPTIVE LITERATURE

NOTE THE VERY COMPREHENSIVE SCOPE OF THE WORK

- **Public Policy and History**
  - Legislative History
- **Purpose, Scope and Constitutionality**
  - Purpose of Act of 1938
  - Judicial History
- **Definitions**
  - FDA Rulings
  - Court Decisions
- **Prohibited Acts**
  - Violations of the Act
- **Penalties**
  - Information Procedure
  - Seizure; Burden of Proof; Evidence
- **Food Standards**
  - Adulterated Foods
  - Misleading Containers
  - Tolerances for Poisonous Ingredients
- **Drugs and Devices**
  - Misbranded Drugs and Devices
  - Resumes of Cases
- **Cosmetics**
  - General Discussion
  - Resumes of Cases
- **Administration of Act**
  - Judicial Review
  - Examination and Investigations
- **Imports and Exports**
  - Examination and Refusal of Admission
- **Federal Trade Commission Act**
  - Interpretation of Act
  - Intent to Deceive
- **Wheeler-Lea Act**
  - False Advertising
  - Name Similarities
- **Robinson-Patman Act**
  - Relation to F. D. & C. Act
- **Miller-Tydings Act**
  - Relation to F. D. & C. Act
- **Sherman and Clayton Acts**
  - Relation to F. D. & C. Act
- **State Food and Drug Acts**
- **State Unfair Trade Acts**
- **Coca-Cola Cases**
  - Resumes of Leading Cases
- **National Biscuit Company Cases**
  - Resumes of Leading Cases
- **Patents and Trade-Marks**
  - On Foods, Drugs, Cosmetics, Soaps

THE W. H. ANDERSON COMPANY • CINCINNATI

Published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50; To Students in Law Schools, $1.50

TABLE OF CONTENTS

The advertisement reproduced above is from the May 17 number of "Feedstuffs." It is one of a series of trade magazine advertisements of The Corporation Trust Company, C T Corporation System and associated companies.

An article in the November 1938 issue of The Corporation Journal titled, "Maintaining a Stock of Goods within a State" has citations to cases in 30 states which will be of great interest when a client is considering maintenance of a stock outside his domestic state for quick delivery. Look up your copy of The Journal or write for a reprint of the article. No charge or obligation.

THE CORPORATION TRUST COMPANY, C T CORPORATION SYSTEM and ASSOCIATED COMPANIES

ALBANY: 158 State Street . . . ATLANTA: 57 Forsyth Street, N.W. . . . BALTIMORE: 10 Light Street . . . BOSTON: 10 Post Office Square . . . BUFFALO: 295 Main Street . . . CHICAGO: 208 So. LaSalle Street . . . CINCINNATI: 441 Vine Street . . . CLEVELAND: 925 Euclid Avenue . . . DALLAS: 1309 Main Street . . . DETROIT: 719 Griswold St. . . . DOVER, DELAWARE: 30 Dover Green . . . HARTFORD: 50 State St. . . . JERSEY CITY: 15 Exchange Place . . . KANSAS CITY: 926 Grand Ave. . . . LOS ANGELES: 510 S. Spring St. . . . MINNEAPOLIS: 409 Second Avenue S. . . . NEW YORK: 120 Broadway . . . PHILADELPHIA: 123 S. Broad Street . . . PITTSBURGH: 535 Smithfield Street . . . PORTLAND, MAINE: 57 Exchange Street . . . SAN FRANCISCO: 220 Montgomery Street . . . SEATTLE: 821 Second Avenue . . . ST. LOUIS: 314 North Broadway . . . WASHINGTON: 1329 E Street, N.W. . . . WILMINGTON: 100 West 10th Street

THE ORGANIZED BAR AND NATIONAL DEFENSE*

By HON. JACOB M. LASHLY

President of The American Bar Association, 1940-41

AGAIN we are gathered in annual meeting. In a very real sense, we, like the Nation, are waiting upon the whims and wishes of one ambitious and wicked man. Entirely against our will the manner of our living depends in large measure upon the tortuous course of the fortunes of Adolf Hitler and his associates.

It is the duty of this assemblage of American lawyers to study problems peculiar to the profession of the law, but it is also incumbent upon it to consider the part which the profession shall take in the problems which confront the Nation and the world in the present emergency.

One year ago, upon being inducted into the office of President, I said, "the chief task which lies before us all in the coming year is that of preparation for adequate national defense." Let me repeat it with redoubled emphasis now. Most of you are witness to the intensive effort which the Association is giving to this great national business by all of the means which so far it has been able to devise. I need not add any word of praise or appreciation to those men and women who have responded to the call and come forward to give of their services on committees of defense, state, local or national, in the furtherance of this vital work. Nor to those loyal members engaged on committees or similar assignments in the other branches of our endeavor, which has been carried forward in a variety of fields, devoted in one way or another to putting the country in a spirit as well as condition of defense. The satisfactions which proceed from the knowledge that the work which they have done and the contributions they have made are of value to the cause will suffice. They will ask no more.

Out of the vague fears and the confusions of a year ago there has emerged one clear question: Shall we be able to keep alive the principles of freedom and justice which are the primary objectives of our government; the accepted goal of the few remaining nations called Democracies; the secret aspiration and prayer of myriads of unhappy people who have become the victims of the oppressor?

In these circumstances it was not difficult to decide upon a subject for the Annual Address of the President. It seemed that it could not be other than "The Organized Bar and National Defense."

I. The "New Order" and the American Morality Compared

One of the things which is clear to more people now than was possible a year ago is that the new order which is attempted to be set up for Europe and Asia, and which also is proposed for the rest of the world, is wholly irreconcilable with the fundamental principles of America. The contrasts between the Nazi order and the American ideal of life are beginning to stand out more boldly. The growing realization of just what it is that the Nazis are preparing for the other peoples of the world has left no doubt that we must prepare to defend our heritage of the good life, or join the ranks of those who have been defeated and despoiled.

It was twenty-three years ago last month that Walter George Smith of Pennsylvania, in delivering the President's annual address to this Association, was saying that the United States had a million and a quarter of our soldiers on the battlefields and another million and a half in training for the great struggle then going on in Europe. "For more than two generations," he said, "the materialistic philosophy of Germany has been undermining the idealism of Christian nations and all that has been gained in the slowly upward trend of justice among men." And he added: "Just as the world took a new birth after the civil war in America and by the extirpation of slavery a great moral issue was forever settled, so we may well believe that when the power of Prussia and her vassals is finally broken another moral issue will be settled throughout the world for all mankind, the right of peoples to self-government." Since that day the German philosophy of materialism has been given a sadistic warp by the Nazis, and their desperate efforts to establish racial superiority and dominance have beckoned them on to crimes of aggression from which there seems no turning back. A few days ago it was reported that four-fifths of the population of the world are now at war. I would not know with what pain and disillusionment Mr. Smith would look upon our new training camps and fields, where an army of three million men is feverishly being made ready for defense; upon a navy, which is to be unbelievably vast and formidable; upon an air force, which is to combine all of the genius of the Americas with the experience in frightfulness emerging from the newest and most terrible war of all. We pray God that those others who are standing in the path of the predatory avalanche may hold it back until we shall have completed our preparations to withstand it, if and when our turn shall come! In less than a quarter of a century after the prophetic utterance of this great American lawyer, Hitler with extraordinary efficiency had abolished all ideals of humanity or mercy and had made of the Germans an outlaw nation, with their hand against every man, and the hand of every man, either openly or covertly, against them.

It must not be supposed that the thing which is represented by the advance of the robots, human and

*Presidential address, at opening of Annual Meeting at Indianapolis, September 29, 1941.

mechanical, which are spreading devastation across Europe and into parts of Asia and Africa amounts to a mere temporary rebellion against the laws of God, or humanity, or the restraints of conscience, as outlaws or criminals, who acknowledge the existence of political order and the claims and rules of society, but set out in anger, greed or revenge to break them. We shall have to get used to the idea of a total negation, which denies the existence of God, the validity of any humane principle, and lightly dismisses the promptings of conscience, and the entire realm of the human spirit. The struggle between Nazi Germany and Communist Russia is a fight to the death, as wild animals fight. Each of the combatants understands that loss of the war means the loss of life. And the engagement is being fought without chivalry, or humanity, or mercy. Should the Nazis prove able to turn from another fallen foe to the defeat of Britain, only force, and intrigue, and brutal oppression will be alive in Europe. Justice, which entwines its roots about the moral law, and finds its sanctions in the comfortable conscience of mankind, will be dead. The immediate question which confronts us, therefore, is, how can we improve the quality of our loyalty and unity, at the threshold of our emergency, so as to preserve the institutions which have enabled us to have the way of life for which we care so much. Is the spirit of Democracy to survive in America, regardless of who shall be the victor in the struggle abroad? When we have finished with our National Defense, are we to have left some of the things which we started out to defend?

The new danger which threatens us has taken us, as it did the other nations, at a time when we were least prepared to meet it. In addition to the deep-running aversion to war and the universal will to peace, differing philosophies and theories over the management of property have confused us. It has begun to be urged that we must relinquish our old ideals, which no longer seem to serve our purposes, because of the changes which have come about. These changes are variously assigned to technological advances, improved transportation, newly discovered and developed means of communication, awakened social consciousness and the like. The fact is that the American people still cling to the old beliefs, despite the many appearances to the contrary. Underneath the superficialities and externalities of our modern life, the principle so aptly phrased in the Declaration of Independence that "all men were born free and equal" still dominates us. We have thought so much about business prosperity, and who shall have or share the fruits of its success, that the fundamental motive of equality among men has become twisted into meanings which are hostile, and which prevent the development of the normal spirit of unity. In seeking liberty for property upon the one hand and social justice upon the other, the very essence of fairness often has been subordinated in importance to advantage, or convenience, or speed. Liberty, in such an order, is little better than the practices of men who claim the right to prey upon each other. In the ten years before the great depression there were 50 billions of dollars of new securities issued for the market, secured by the assets of the nation which were not increased in quantity by the process. After making proper allowance for added property values due to improved efficiency in the methods of its use, there was yet a vast increase in the apparent quantity of external wealth due alone to sales expansion and commercial propaganda. Here was a false and selfish structure, which fell upon the just and the unjust alike. Some of the men of our profession became the victims as well as the participants in this misguided use of liberty. It was to correct this and similar abuses on the part of the managers of property in the use of their liberties that the dominant political support has turned toward extreme liberalism. But here also the practical forces are subject to misuse. It is as easy to confuse the outer purposes of liberalism with the inner purposes of freedom as it was in the case of reaction. Victory in the most sanguinary battles for increased wages or closed shops gives the illusory appearance of winning the fight for liberty. More and more these interpretations give our attempts at improvement the aspect of a sordid struggle of one set of selfish interests against another. It is a curious and a tragic misunderstanding of liberty which has threatened to divide us.

If the disaster which has overtaken the stricken European nations, and Germany (for hers is the greatest disaster of all) has brought home to us any lessons of value, one of them is that where a nation devotes itself to the acquiring, or the division, or the distributing of wealth, and takes that as its goal, the goal eventually degenerates into self-destructive conflict. The incapacity or indisposition for sacrifice which has come upon us through the influence of the prosperous years leaves us in marked contrast to the lives of frugality which the German people have been taught to lead in order that they may become the conquerors of the world. If we are to translate into reality the hope expressed by President Roosevelt that we shall be "the arsenal of Democracy"; if we are to make to mankind the contribution which we have been proud to boast that it is our destiny to make, it must be through the recapture of certain quite simple things. Benjamin Harrison, a great Indiana lawyer, and a great American, speaking to the people of Vermont in 1891, said: "Let us be careful that our heads are not turned by too much prosperity. It has been out of hardness, out of struggles, out of self denials, out of that thrift and economy which was an incident of your soil, that the best things in New England have come." Unless the signs of the present are false counselors and the experience of mankind an untrustworthy guide, we must begin again to practice economy and thrift, in public spending and work as well as in that of our private lives and enterprises: to do an honest and conscientious day's work for fair

compensation; to find happiness in the achievements of our work, and joy in a job well done. These are some of the primary bases of everyday life. They furnished a philosophy of sanity and virility for our grandfathers who came to this place in covered wagons. In the exercise of these virtues, they found strength of body, courage of mind and unity of spirit. And in their exercise we shall find them too.

In the advocacy of such a program and with such an adventure in morale, the members of the bar, in their individual capacities as influential citizens, must accept just now the challenge of a great service.

II. Duty of the Organized Bar in Improvement of Procedure and Judicial Selection

Passing from that phase of our responsibility, however, it is even more important to consider with you the special duty which rests upon us as members of the legal profession, and particularly as an integrated force expressing itself through the organized bar.

What, then, are some of the things which the organized bar will be able to do?

Perhaps there is no person or group in America less conscious of the power which their numbers and influence in the communities in which they live give them than the members of the bar. The idea that lawyers are professionally concerned only with the courts may no longer be accepted. They are looked upon individually as those who know what to do in any situation or difficulty which might arise. Circumstances have radically changed since Anglo-American lawyers became a self-conscious professional group, and since the American Bar began to move as a unit and to enter upon its distinctive work. We have advanced from a simple agricultural-commercial society to a vast and complex industrial civilization; from comparative isolation to inescapable and endangering contacts with a disarranged world. These revolutionary changes confront the legal profession, as they do other groups. But the work of lawyers remains basically the same, despite all changes. So does their responsibility. It is the work and the responsibility of devising procedures which are adequate to the performance of governmental tasks and which contain, at the same time, efficient safeguards to private interests. Forms and methods may change, but this two-fold work always remains to be done. Its importance increases rather than diminishes as the scope of governmental activity expands. Its successful performance is essential to the success of our national objectives whether of peaceful progress or of national defense. Lawyers do not suffer any loss in importance in times of crisis such as this when compared with any other "essential" group. Indeed they alone hold the keys to much upon which the loyalty of the citizen and the fate of the government alike depend.

Behind an invincible army, navy and air force there must be a solid and satisfied citizenry. There must be those who believe in their country and its institutions. It is unlikely that any branch of the Government leaves as deep and permanent impressions upon the hearts of the many persons whom it touches in civilian life as the courts, where the people resort to submit their causes, redress their wrongs, and try out the merits of their claims. The measure of their patriotism will be in direct proportion to the satisfaction and confidence which they have felt in the administration of the law as an instrumentality of justice. It is to be credited to the organized bar of America that it has not been idle in this essential field. In the year 1938, the major work of the Association was devoted to the betterment of the implements for the administration of justice. We are even more aware now that this is a task of the most extraordinary importance which is the especial duty of lawyers and judges. It must be made to serve the cause of unity in this time of threats to our safety and peace, as well as in that other day, when exhaustion or frustration shall have stilled the roar of bombs, and grounded the monsters of the air. And post-war poverty and desperation shall have diminished the capacity of the peoples of many nations for understanding liberty or justice, as we understand them now.

Authority to make and to change the rules of practice must be further entrusted to the courts, as has been done in Federal procedure, and in twenty of the states. This work is too intricate for larger miscellaneous groups such as legislative bodies. It requires technical knowledge and freedom from politics. Then there is the judge, who represents the power of the state, and personifies the dignity, learning and integrity which always, in all walks of life, is associated with the idea of justice. Even a model Practice Act will avail but little with an inefficient judge. The popular election of judges by the old political method is obviously not the best means of selecting these important officials. Especially not, in the great cities and congested areas. The organized lawyers can do something about both of these things. There is bar integration as an aid to lawyers; the Judicial Councils and Judicial Conferences are tools available to the judges.

An improved and simplified Practice Act then, with provision for its perpetual care; a method of removing the judges from the political arena—these two contributions would be a great gift to any state, and to the country, in the cause of National Defense. Lawyers and judges, working together, can do this. There really is no other group who can. And this is the most strategic time we have ever had to accomplish that which through the years has limped along undone. It is a time when everyone is stirred with an unaccustomed zeal to do his part to save the institutions of democracy which may have been neglected. There may not come another opportunity for the organized bar of America to do a work of such vital public worth, within the span of life of any lawyer here. In truth there is no assurance in these fateful years that such a time will ever come again.

III. Duty of the Organized Bar in the Legislative Process

There is yet another field of duty which ought to be mentioned now. It is that the organized bar must take a more important and effective part in the making of laws than ever it has done before. The Supreme Court has relaxed its previous policy of strict enforcement of the limitations of the Fifth and the Fourteenth Amendments to the Constitution. Both the Congress and the legislatures of the states have been relieved of restraints previously applied so as to allow them wide latitude in making provisions for the problems of a rapidly changing society, according to their own ideas of policy. In popular phrase, the legislative branch may be said to be "on its own" now at least in the field of progressive legislation. Thus a heavy responsibility has been added to those already resting upon the Congress, by the change in constitutional interpretations begun four years ago. Nor has the demand for quantity legislation slackened off. A desire for the rapid improvement and change of our remedial system is accompanied by an impatience, which tends to hurry us along with law-making by the most direct route. There is no time to wait for the slower and more deliberate process of court decisions. Modern administrative law goes even further and multiplies with even greater speed, for the achievement of immediate effects upon the moving current of business and trade. There are fewer safeguards now than formerly, with larger quantity, and greater haste.

These are some of the incidents of liberalism no longer in the realm of theory or debate. The changes actually have come about. They are here. What then shall the organizations of the bar do about this? Because the situation may have developed to this point against the opposition of much of the conservative sentiment of the bar, shall we feel any less responsibility for making our institutions work? Upon the contrary, the meanings of the time are very clear. A new field has been opened in which the special knowledge of lawyers nominates them to new duties. It is to the work of analysis, advice and influence in devising and drafting, and so far as possible, in securing the passage of laws which are constitutional, and which are in the public interest. It has been the traditional policy of the American Bar Association and, without exception I think, of the state and local associations also, not to engage in any political activities; nor as a group to become affiliated with any political party or movement; nor to lend themselves to the endorsement or support of any candidate for political office. Undoubtedly this is a sound and a wholesome policy. Should it ever be departed from, either in profession or in practice, the most unhappy and disastrous results would surely follow. But the time has come now when the organizations of the bar must take a more active and influential part in public affairs, as other nationally organized groups have found it necessary or expedient to do.

They must not any longer hold aloof, for the fear that their purposes may be misunderstood, or misconstrued. The times will not admit of that. The experience of recent years has shown that the members and the committees of Congress receive with appreciation the product of the painstaking, public-spirited work of the committees and agents of the bar, where the quality of the work is such as to commend itself, and where their objective attitudes and disinterestedness clearly appear. There must be an increase in these activities.

An even more determined effort to throw the force of the organized bar into the legislative process of the states, pursuant to public duty, seems clear. There are to be found in state legislatures many splendid men of ability and experience, whose devotion to the public good and habitual attention to duty commend them as useful public servants. There are also laymen of good intentions but who are unfamiliar with and wholly unqualified to cope with the technical aspects of law-making. These are dependent upon the advice of others. Then there are certain members of the bar, usually not affiliated with any professional organization. They may be deficient in professional pride, or indifferent to those high standards which actuate the conduct of lawyers generally. The attitudes of hostility and suspicion which these gentlemen assume toward the accredited representatives of bar organizations tends to confuse and mislead the uninitiated, into supposing that there is involved something of a family dispute in which lawyers of one kind or group are embroiled against those of another. It is manifestly impossible for the public to discriminate between those who are on the right side and those who are on the wrong side of intricate legislative questions in their early stages. It is just as hard to identify or single out the person or persons who should be held responsible for the failure of measures which truly would have been for the public good. This is particularly true of remedial legislation, or that having to do with improvement in administration of law in the courts. Members of the bar, who are loyally carrying committee or other specially appointed assignments, must not be discouraged by misleading impressions planted or fostered by these persons, or by the false and sinister pretense that they are unwelcome guests at the legislature, or that their duty well and persistently done would be injurious to the cause which they seek to advance. Nor will they hesitate to give of their time for conference and study, upon the ground that they are too busily employed upon their private or professional affairs. They have it within their powers and abilities to search out and to discover the merits of pending measures, better than others. In the distribution of tasks for National Defense, this one belongs to us. We shall not shirk it, nor miss the opportunities which it affords.

IV. Principles Are Eternal; the Banishment of Want and Fear

And finally, we shall not be afraid. The basic facts of

life and the records of time have an extraordinary tendency to repeat themselves with fidelity. Two of the universal desires of the human heart expressed by a nearly forgotten man of long ago will be recalled by some of you. Living in a period of confusion and war, he had envisioned a time when the wars should cease, and the instruments of destruction then in use and fashion should be converted into implements of peaceable production and husbandry. In that day, when the peace had been established, the nations would not even learn war any more. "But," revealed this humble man of God, prompted by the spell of his vision and of his longing, "they shall sit every man under his vine and under his fig tree; and none shall make them afraid." This noble passage presents one of the most satisfying pictures in the literature of the earth. It was spoken by Micah, one of Jehovah's ancient mouthpieces, a minor prophet, doubtless no less inspired, if less famous, than the major ones. It is impossible to pretend that the world is not now even farther from a realization of this beautiful prediction than were the peoples of that far away time and relatively primitive culture. But it is evident that the hope and faith of mankind has endured through the course of history and experience, for the twenty-seven centuries which have elapsed since the prophet spoke.

It was but last month that a conference took place somewhere in the American waters of the Atlantic Ocean, which excelled in dramatic interest to the people of the Western Hemisphere any other event of the present world war. The responsible heads of the two great English-speaking democracies were discussing the war aims of the peoples whom they represented, and the terms on which the peace could be made. One of the parties to this historic parley was at war, the other was not. There were no illusions now. Each of these statesmen had been witness to the fourteen points of President Wilson which had electrified the embattled world of 1918. Witness, too, to the tragic turning of the world politicians from the lofty peaks on which the war had ended, to the lower levels in which the peace was written. In eight terse points a program for the future, beyond the war, was drawn. Seven of the points were devoted to means and methods by which workable techniques could be adopted for the interchange of commerce and other international and trade relations in harmony and tolerance, if not cooperation. These were to be the mechanics, the means. But the eighth point, the sixth in numerical order, set forth the mind and purpose of these two realists for the order which must follow the war. Let us review their words:

> After the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford that all men in all lands may live out their lives in freedom from fear and want.

It seems obvious that the provision for liberating the peoples of the world from want at the close of the awful carnage now in progress will be difficult of fulfillment. The warring nations already have destroyed property of incalculable value. The cost of preparing and furnishing the weapons and supplies with which this is being done is said to approximate the sum of two hundred million dollars per day, and is steadily increasing. Compared with the first world war, on the basis of per capita costs, it is calculated that the expense of killing a man is twice as great now. Of course, nothing can replace the value of the lives which are taken, the ruined health, the perverted training of the millions who are to survive, which but for the war years and the periods of preparation, would have gone into constructive work. And destruction is at its peak with no suggestion of peace from any source. In the present disposition of the things of the world, the democracies have the dominant supplies of industries and of wealth. But it would take a long time to remake or replace that which will have been destroyed. A longer time to devise distribution methods which would relieve the want and misery which always stalk the paths along which war has gone. Nevertheless in making the investments which we are to make of ourselves and the things we own, we shall go forward without fear. "And none shall make them afraid," said the prophet. "All men shall live out their lives in freedom from fear," echo our modern statesmen. Here is an idealism of olden times, adjusted to the realisms of today. Nothing is changed in all the reaches of the centuries, except what man has changed for his own purposes. Right and might hold the same relation to each other that always they have had; and the wages of sin still is death. We shall not fear Hitler—it is ignoble to be afraid of any man. In the terrible year of 1803 when it appeared that Napolean was to invade England, Wordsworth, deeply depressed, wrote these lines which seem extraordinarily close to us today:

> When looking on the present face of things,
> I see one man, of men the meanest too!
> Raised up to sway the world, to do, undo,
> With mighty nations for his underlings,
> The great events with which old story rings,
> Seem vain and hollow; I find nothing great;
> Nothing is left which I can venerate;
> So that a doubt almost within me springs
> Of Providence, such emptiness at length
> Seems at the heart of all things. But,
> Great God!
> I measure back the steps which I have trod;
> And tremble, seeing whence proceeds the strength
> Of such poor instruments, with thoughts sublime
> I tremble at the sorrow of the time.

But England was not invaded, and has not been invaded unto this day. Nor shall we fear the future, whose dangers we cannot know. That would be cowardice. Truly this is a time that tries men's souls; but most of them, when they are tried, are not found wanting. With whatever energies we may possess; with loyalty complete and uncomplaining; with an inextinguishable will to defend our country, our people and our system of government, the solid Bar of America can be relied upon to give itself to National Defense. *And we are not afraid.*

HIGHLIGHTS OF 1941 ANNUAL MEETING

THE sixty-fourth Annual Meeting of the American Bar Association was held in Indianapolis, Indiana, September 29th through October 3rd. This issue of the JOURNAL is devoted almost wholly to chronicles of its proceedings and some of the principal addresses.

The attendance and sustained interest were first of all a demonstration that the American Bar Association can and will continue to function actively, in the presence of National crisis and war emergency. Indeed, the spirit of the meeting was that the organized Bar ought to put forth redoubled efforts at such a time. Deep patriotic feeling pervaded the sessions, with a high resolve that all resources and agencies of the Association should be used in behalf of National defense and the protection of the vital freedoms against inroads from abroad or from within.

Although it was not one of the largest meetings in the recent annals of the Association, the attendance was larger than had been expected. It taxed the hotel facilities of the host city. All parts of the country were represented in the registration, although naturally the concentration of attendance came from the Middle West and the Northeast.

The lawyers of Indianapolis and the State of Indiana were gracious and untiring hosts. The meeting-places for the main events were commodious and convenient. Unexpectedly large attendance at some of the Sections, with their attractive programs and many "round table" sessions, led to congestion in some of these gatherings; but any crowding was accepted good-naturedly.

Dominant Interest in the Programs

Perhaps the most significant aspect of the 1941 meeting was the marked upsurge of interest in the Sections and in the programs of unusual quality and attractiveness which many of the Sections had arranged. Several of the Sections had not limited themselves to their usual routines of programs dealing with their specialized fields of law, but had arranged for speakers and subjects of general and popular interest, which led to the attendance of many members not ordinarily interested in the work of the Sections.

Outstanding in this respect was probably the Section of Judicial Administration, which staged a truly notable discussion of Administrative Law, by Attorney General Biddle and Dean Roscoe Pound, and also a Monday evening dinner of brilliant quality; the Section of Real Property, Probate and Trust Law, which made real contributions to the week's program; the Section of Taxation, which did hard and useful work on the new problems of law in its field; and the Section of International and Comparative Law, which dramatized the current interest in international problems and conducted an important symposium on Hemispheric Solidarity. Other Sections had put together worth-while programs, and were rewarded with good attendance and lively interest.

All members of the Association would do well to enroll at once in the Sections which interest them, so that they may receive promptly the Section publications containing much material which will be useful to them in their professional work.

Ascendancy of Interest in the Assembly

At all times during the week, however, the programs and events in the Assembly, made up of the general membership attending the meeting, held the ascendant interest. From the fall of the gavel Monday morning, and Albert H. Cole's eloquent address of welcome, the gifted response by Governor Forrest C. Donnell, of Missouri, and President Lashly's stirring appeal for "all out" cooperation by the Bar in the tasks of National defense, through to the last session, made notable by Incoming President Armstrong's trenchant exposition of the point of view and objectives of the organized Bar, the Assembly was to an unusual extent the dynamic center of convention interest.

The House of Delegates had many important items of Association business on its agenda; it transacted them with its usual thoroughness and dispatch, under the Chairmanship of Thomas B. Gay, of Virginia; many of the items were important, for the Association, the profession, and the country, as the detailed account of its proceedings, to be published in the December JOURNAL, will show. But this time the pendulum of prevailing interest seemed to swing to the general Assembly, where the subjects uppermost in men's minds were being discussed.

Our Distinguished Guests

This Annual Meeting was made notable by the presence of many distinguished guests, from foreign lands and from the United States. From England came Sir Norman Birkett, K.C., one of the outstanding members of the British Bar, who proved to be an eloquent and genial spokesman for the cause of the democracies. At a time when the historic shrines of freemen's justice under law have been ravaged by bombs and fire, the presence of this great lawyer, gifted and as imperturbed as his own people, stirred deep emotions among American lawyers, for whom the future is shrouded in uncertainties.

From the Bar of Canada came again the beloved D. L. McCarthy, K.C., of Toronto, lately President of the Canadian Bar Association, and Mrs. McCarthy. Their return was most heartily welcomed. From official Canada came the Honorable Pierre Casgrain, the eloquent Secretary of State for Canada, with Mrs. Casgrain, the representatives of the French-speaking people of Canada, for whom Americans feel such close ties of friendship.

The Junior Bar Conference for the first time extended an invitation to a young Canadian lawyer, R. D. Guy, Jr. He ably presented the problems encountered by the young lawyer in wartime.

The Association was also honored by the presence of Dr. Enrique Gil, distinguished lawyer from the Argentine, Vice-President of the Bar Association of Buenos Aires, Vice-President of the newly formed Inter-American Bar Association and Dr. Victor Daniel Goytia of the Buenos Aires Bar. From Cuba came Manuel J. Supervielle and Raoul Herrera-Arang; and from Brazil came Dr. Richard P. Momsen of the Rio de Janeiro Bar.

Official Washington was represented by Mr. Justice Robert H. Jackson, long an active worker in the American Bar Association; Secretary of the Navy Frank Knox, who had been scheduled by the Section of Real Property, Probate and Trust Law, but who was transferred to the Assembly program for the delivery of a carefully prepared and important address on sea power in world affairs; the Undersecretary of War, Ex-Judge Robert P. Patterson, who spoke at the dinner of the Section of Real Property, Probate and Trust Law; Senator Tom Connally, of Texas, Chairman of the Foreign Relations Committee of the United States Senate; Judge Hatton W. Sumners, of Texas, Chairman of the Judiciary Committee of the National House of Representatives; and many others, who contributed to the varied programs of a worth-while meeting.

The "Open Forum" on Resolutions

Reflecting the strong feeling which actuates lawyers on many subjects during the present crisis, an unusually large number of resolutions were offered from the floor by individual lawyers, at the opening session of the Assembly. In nearly all instances, they expressed the individual views of their proponents, as well as an individual's formulation. As will be noted from the detailed narrative of Thursday's proceedings in the Assembly, these resolutions covered a significant variety of subjects. Several of them were aimed in opposition to the American foreign policy as conducted by the President of the United States, and sought a critical declaration from the Association in accord with the views of the proponent.

In fulfillment of the Association's constitutional requirements and practice, these resolutions as offered on the opening day were referred to a large and representative Resolutions Committee, headed this year by the Honorable Hatton W. Sumners, of Texas, the experienced Chairman of the Judiciary Committee of the National House of Representatives. Public hearings were held by the Resolutions Committee, at which proponents and opponents of the proffered resolutions were given an opportunity to be heard.

The Resolutions Committee reported each resolution to the Assembly Thursday forenoon. Several significant resolutions were supported, and were adopted by the Assembly, and later by the House of Delegates, as the bicameral action of the Association. As to several other resolutions, it was the view of the Resolutions Committee that they should not be acted on until they had been considered and reported on by the Section or Committee having their subject-matter in charge, so that they could be correlated to the policy of the Association in the light of all pertinent considerations. Such recommendations for reference were sustained by the Assembly.

Resolutions directed against the President and the foreign policy of the United States were reported adversely by the Resolutions Committee; and after hearing the proponents, such resolutions were rejected by the Assembly. There was a feeling manifest that no useful purpose would be served by Association action on divisive issues, as to which their germaneness to the Association's chartered purposes was at least open to a great deal of doubt. Some or many members who voted against the resolutions may have had some measure of sympathy with their objectives; but there was a significant unity in the decisive vote against dividing the Association on issues which lacked obvious relationship to the juristic scope of the Association.

Election of Assembly Delegates

In an effort to ensure a larger participation by attending members in the nomination and election of the four Assembly Delegates to the House of Delegates, a new plan was given a trial, within the frame-work of the constitutional provisions. Heretofore, the nominations had been made at the opening of the Wednesday morning session of the Assembly, held at an hour which did not lend itself to large attendance; an election followed immediately, with the distribution and use of written ballots.

This year the nominations were made Monday forenoon, late in the opening session of the Assembly. Thirteen nominations were made from the floor. This was the largest number since the first choice of Assembly Delegates in 1936. It consummated the original plan that nominations should be freely made, in sufficient number that anyone nominated should deem it an honor to be put forward and no discredit to fail of election.

Voting took place on Wednesday, with ballot boxes and a printed ballot containing the names of all the nominees. Meanwhile, a good deal of friendly rivalry developed among friends of the nominees, and some "bullet voting" was organized. Voting took place throughout the day, with a ballot box at the convention hall and at the Claypool headquarters. The number of votes cast was substantially increased, as a result of the solicitation for votes, but the increase was not as large as had been anticipated.

The outcome, among the thirteen nominees, was the re-election of Arthur T. Vanderbilt of New Jersey and William L. Ransom of New York, and the election of Lewis F. Powell, Jr., of Virginia, and Carl B. Rix, of Wisconsin, each for a two-year term.

At the first session of the Assembly, Charles A. Beardsley of California was the only nominee for Assembly Delegate to fill the vacancy caused by the absence of John Perry Wood, also of California, who was addressing a meeting of the Colorado Bar Association. Mr. Beardsley received the compliment of unanimous election by motion.

Enjoyable Entertainment Features

As usually transpires when the Annual Meeting is held in one of the relatively smaller cities in the Middle West, the presence of the American Bar Association was hailed by the whole community. Lawyers and citizens alike strove to make the visitors feel welcome, and to extend warmly the treasured Hoosier hospitality.

The Indianapolis Bar Association, the Lawyers Association of Indianapolis, and the Indiana State Bar Association, with the City and State Governments, combined their efforts in the entertainment and social features. Joe Rand Beckett, of Indianapolis, was the diligent Chairman of the General Committee, with Thomas C. Batchelor as Secretary and Charles W. Holder as treasurer. The Women's Executive Committee was headed by Mrs. Clarence R. Martin as State Chairman. The genial State Chairman of the large Reception Committee was Eli F. Seebirt, of South Bend, with Roscoe C. O'Byrne of Brooksville as Vice-Chairman. Members of the Committee were omnipresent on their job. Theodore L. Locke, of Indianapolis, was Chairman of the Men's Entertainment Committee, with Emsley W. Johnson, Sr., Joseph J. Daniels, and Davis Harrison as Vice-Chairmen. Mrs. Benjamin Buente, of Evansville, was State Chairman of the Ladies' Reception Committee, with Mrs. Arthur R. Robinson, of Indianapolis, as State Chairman of the Hostess Committee. Albert H. Cole, of Peru, headed the Finance Committee, and Gilbert Shakes, of Vincennes, was State Chairman for hospitality to the National Junior Bar Conference. These and the usual other Committees in charge of special features were most gracious and capable hosts.

The entertainment and social events throughout the week were most enjoyable. In the magnificent Scottish Rite Cathedral on Monday evening, a notable concert was given for the visitors, by the Jordan Conservatory Symphony Orchestra, with Fabien Sevitsky conducting, and the Jordan-Butler University Symphony Choir, with Joseph Lautner as director.

Sight-seeing tours throughout the week took visitors to many interesting and historic places, such as Fort Benjamin Harrison, Stephen Foster Hall, the Realsilk Hosiery Mills, Indiana University at Bloomington, the Benjamin Harrison Home, and the imposing War Memorial. On Thursday the ladies were guests at tea at the home of Governor and Mrs. Schricker. Many private homes were hospitably opened to the visitors during the week.

The outstanding social event of the week was, as always, the reception and dance on Wednesday evening, which was tendered to the members by President and Mrs. Lashly in the Scottish Rite Cathedral. Rarely, if ever, has this function had a more adequate and beautiful setting; and the throng of members enjoyed the occasion to the utmost. President and Mrs. Lashly received most graciously, with their distinguished guests from other lands.

Election of Officers

No nominations were made for the officers of the Association, other than those made by the State Delegates last March and duly published in the JOURNAL. The House of Delegates elected Walter P. Armstrong, of Tennessee, as President and Guy R. Crump, of California, as Chairman of the House of Delegates. Harry S. Knight, of Pennsylvania, was re-elected Secretary and John H. Voorhees, of South Dakota, was re-elected as Treasurer. For the Board of Governors, Frank W. Grinnell, of Boston, was elected in the First Circuit, to succeed George R. Grant, deceased. In the Fourth Circuit, Willis Smith, of North Carolina, was elected to the Board of Governors, and was appointed to the Budget Committee. In the Seventh Circuit, Ex-Judge Floyd E. Thompson of Chicago was elected. In the Eighth Circuit, Morris B. Mitchell, of Minneapolis, was elected.

Philip J. Wickser, of Buffalo, became Chairman of the Budget Committee, with Sylvester C. Smith, Jr., of New Jersey, and Willis Smith, of North Carolina, as members. Thomas B. Gay, of Virginia, and Professor James Grafton Rogers, of the Yale Law School, were elected to the Board of Editors of the JOURNAL.

The Assembly and the House of Delegates adopted various amendments, mostly of a formal character, for the improvement of the Constitution and By-laws of the Association. Details will be given in the account of the proceedings of the House.

Time of Annual Meeting

Although a goodly number of judges of State and Federal Courts were present during at least a part of the meeting, many of them confessed difficulty in attending sessions early in October. This particular meeting was favored with cool weather. On the part of many members present, there was a feeling expressed that, regardless of weather and temperatures, the Annual Meeting is best held in July or August, when judges, law professors, lawyers in the various departments of the State and Federal governments, and lawyers engaged largely in trial work, can most conveniently attend. In the opinion of many other members, a meeting in the South or Southwest, in the winter or late autumn, would prove most enjoyable and would attract a large number of members who do not otherwise attend.

In any event, the preference of those who favor a mid-summer date found support in the action of the Board of Governors on the last day of the meeting. In selecting Detroit for the 1942 meeting, its time was fixed for the last week of August.

THE TIES THAT BIND*

By SIR NORMAN BIRKETT, K.C.

Of the English Bar

MR. PRESIDENT, Members of the American Bar Association, Ladies and Gentlemen: My first duty is to express to you the sense of honor I experience in being invited to attend the meetings of your great Association and to thank you for the warmth of your welcome and for your unbounded hospitality.

I fully recognize that I have no claims or qualifications of my own to stand here save it be the supreme qualification that I come as a representative of the English bar. In that capacity, sir, I bring to you the sincere and cordial greetings of the Lord High Chancellor, I bring to you the salutations of His Majesty's Attorney General, as the official head of the English bar, and in my own person, as a humble, working lawyer, I bring you my sincere and indeed affectionate regard.

It was said of old that there is nothing new under the sun, but I am one of those who believe that great virtues reside in the old, familiar things, and if the words I now employ are old and familiar, I beg you to believe that they are charged with all the accents of truth and of sincerity.

I cannot refrain from saying that amongst the ties which bind the lawyers on both sides of the Atlantic are the recollections of the visits paid by the American bar to my own country and the speeches which have been delivered there in Westminster Hall by former presidents of this Association. Those were the days when old friendships were renewed, when new friendships were made and cemented in the spirit of complete devotion to those free institutions we both cherish, created and nurtured by the spirit of the common law.

I take pride at this moment in recalling the speech made by President Hughes, as he then was, in 1924 in Westminster Hall, which will long be gratefully remembered. The services which he has rendered since, notably in the office of Chief Justice, will perpetuate his fame, but the speech which he made in London in 1924 will forever stand—noble words from a noble mind. Let me use them here and now:

"We come to tighten the bonds of friendship . . . We come in the spirit of fraternity . . . because it is in truth the spirit of the larger fellowship represented here today, in which differences of particular interest and environment cannot avail to obscure the community of tradition of those who have been trained according to the standards and the methods of the Common Law. We come with even a larger aim than the enjoyment of fraternal association in order that by these agreeable interchanges and a more intimate knowledge of each other, we may promote a clearer appreciation of our privilege, opportunity and responsibility as ministers of justice in a world which needs justice and the reasonableness which makes justice possible."

I can only hope that when the dark clouds which cover the world today are rolled away, as they will be, we shall have a triumphant celebration together of the triumph of those principles of justice, of freedom and of equality which we as lawyers have a special mission to defend.

You, Mr. President, made reference to the fact that my journey to the United States was my first trip in the air. Well, all I can say is that a journey in these days to the United States of America is full of interest and full of incident. It was my first visit to this great country, and I confess that as the outline of your great country came into view, my heart was filled with a profound emotion. Here at last was America, that land which has seized the imagination of men in all ages—the torch of freedom, the rock of liberty, "God's charity to mankind," in the immortal phrase of Emerson. And great sayings from your poets and your authors came into my mind, great deeds of your soldiers and patriots, and great ideals cherished by your lawyers and statesmen. And as the buildings of New York became clearer, in all that shining history of the country, there came something vivid and unforgettable, seen with a kind of magic intensity, of that great host who came here as the years went by from every nation under heaven, knowing the thing which was beyond price, that here they would be free, here they would be free in body and in soul, free from fear. And, in this instantaneous motion picture of the mind, as it were, there came the great refrain from those words which are now stamped upon the imagination of the world as a sign and a symbol, the great Battle Hymn of the Republic—"As He died to make men holy, let us die to make men free."

So you will understand how deep and how profound are the sentiments which I now express of my abiding obligation to the American Bar Association.

Now, that leads me to say that amongst the enduring ties which bind, nothing has touched the heart of the lawyers in England in recent days more than the salutations you were good enough to send when one of our heaviest trials came upon us. The Temple, in which I have spent most of my working days, is not only the possession of English lawyers, it is the prized possession of the world. It is a historic spot which many of you know, where for over six centuries lawyers and statesmen and authors have lived and worked and died. The

*Address before American Bar Association, at annual meeting at Indianapolis, October 1, 1941.

place is really holy ground, for it was from that place and from Westminster Hall that there went forth the Common Law.

Many of you present tonight no doubt have turned off the Strand down the Middle Temple Gateway and in a moment you were by the noble Middle Temple Hall, standing, as it had stood, for nearly four centuries. No doubt you have pictured to yourselves some of the scenes enacted in that great hall, here where Sir Francis Drake came and Frobisher and Raleigh and many a brave and wise and choice spirit of history.

Some of you no doubt reflected that in that very hall where you stood Shakespeare himself came and played with his company of players before Queen Elizabeth in the immortal play, "Twelfth Night," enacted under that great roof which had become black with age.

Some of you no doubt reflected that in this Temple Blackstone wrote his commentaries which have now become a part of law and order on both sides of the Atlantic.

For you and for us, every inch of the Temple had its great and memorable associations with every part of our national life.

Well, as you know, that place of history and memories, that place of noble buildings and priceless treasures, has suffered most severely from the visitations of the enemy. To walk its narrow streets now is to feel a kind of heartbreak at the sight, and when your message of sympathy and understanding and salutation came, it brought with it the knowledge that we were indeed bound by ties which are indestructible.

Just as in Flanders Field in the last war, amidst all the scenes of carnage and desolation, the poppies came, so in the East End of London, where the houses had been bombed, where the warehouses had been destroyed, the great purple willow herb, the rosebay, grows in profusion. The processes of Nature are eternal and work on. The spirit of man is eternal, too, and out of this destruction of the Temple of which I speak there has come the knowledge, certain and clear, that if the Temple were utterly destroyed, something greater than the Temple would live on, for that which made the Temple and preserved it through all the centuries is still there. Men desire, perhaps more passionately than ever, that justice and truth shall triumph not only in Britain, not only in America, but shall triumph throughout the world. The intense belief in freedom does not die but is rather quickened into newer life, and the reign of law still prevails.

The ties which bind us one to another go far beyond language, beyond history, beyond literature. They go down to the eternal verities, for the language of the law is our joint possession, and it is in its essence the language of freedom and the language of free men.

The spirit of the lawyers of Britain certainly rises with the greatness of the ordeal, because they have a clear recognition of the priceless things at stake. They like to think that they have a high trust which they can by no means betray to preserve those essential liberties which in large measure have been committed to their charge.

Now, I am sure that you will forgive me if I say a word or two of a general kind about the people of Britain as a whole. It is not without bearing on the matters which are our peculiar care, and it may give new meaning to our duties and our responsibilities.

I have been privileged, and I use the word advisedly, during the past two years, to see something of the spirit of the people of Britain in perhaps the greatest ordeal which they have ever been called upon to face. I am sure that you will let me say this, that we in Britain are perfectly conscious that if you look into our history you will find much to condemn and indeed much that calls for condemnation. Although there are bright and shining pages in our history, there are leaves of darkness of which we are quite conscious, and which we would, if we could, quite willingly blot out. We tell ourselves more forcibly than anybody else can ever tell us that too often we have paid lip service only to the great ideals and forgotten them in practice. We have spoken of the brotherhood of man and failed to recognize our brethren. We have expressed the desire of opportunity for all and too often denied it where it was most needed.

But these days of war have revealed something more and have, I think, made another contribution to the unending story of the spirit of man. I discovered the other day some words which no doubt are familiar to you which were employed by the Poet Laureate Robert Bridges in his preface to "The Spirit of Man." With your permission, I will just quote them:

"We may see that our national follies and sins have deserved punishment; and if in this revelation of rottenness we cannot ourselves appear wholly sound, we are still free, and true at heart, and can take hope in contrition, and in the brave endurance of suffering that should chasten our intention and conduct. We can even be grateful for the discipline; but beyond this it is offered to us to take joy in the thought that our country is called of God to stand for the truth of man's hope, and that it has not shrunk from the call. Here we stand upright and above reproach; and to show ourselves worthy will be more than consolation; for truly it is the hope of man's great desire, the desire for brotherhood and universal peace to men of goodwill, that is at stake in this struggle."

Surely no words could be more applicable to the state of affairs today. And the reason that I make reference here before an assembly of lawyers to the spirit of the ordinary people is because I believe from my heart that they are sustained by something more than tradition, by something more than mere courage or resolution. They are sustained by a clear purpose and a clear vision which rarely finds expression in words but nevertheless is firmly and deeply felt.

The people of Britain have built up for themselves a way of life which is founded ultimately upon the law, which is protected by the law and is secured by respect for the law. They have come to believe that that way of life, with all its imperfections, with all its shortcomings, is yet of such infinite value that life without these things which go to make it is literally not worth living.

And what are these things which are of such value that plain men and women, the simple man, as Abraham Lincoln called him, the simple folk—what is it that made them ready to suffer and to die and to maintain in their defense that spirit and bearing which has won the admiration of the world?

In some clear-eyed way which I find it very difficult to define, quite ordinary folk in our Island feel of a surety that all we have and all we are have been and are threatened, and these things must be defended to the end. All our people have not read the great books of our literature; Milton is not on every tongue, but felt in the blood is the sentiment, "We must be free or die who speak the tongue which Shakespeare spake, the faith and morals hold which Milton held."

Somehow or other, not only our age-old towns and villages, our gardens, our fields with their wayward hedges, our quiet farmsteads, our old universities, Guild Hall, St. Paul's, Westminster Hall, not only these but all the things which make up our way of life are in jeopardy. The virtues which pervade the whole of decent living, good faith between man and man, the understanding and the tolerance, the right to hold one's opinions, compassion and pity and sympathy for those who are already weak and poor, the right to think for one's self, to speak and to write with freedom, to worship as the heart dictates, to read freely, to live one's own life with due regard to the interests of others and of the state—these things I believe, are recognized by the people of Britain as being things of infinite moment, to preserve which no sacrifice is too great.

And it is because I believe that all these things are regarded in the same light by you that we are bound together by ties which can never be severed. And above and beyond all and pervading and permeating all is the passion in the hearts of men for justice.

No better illustration, I think, can be given at this time of this universal desire than the attitude of the whole people of Britain to this question during these agonizing days of war. It is a matter of great pride with us that the administration of justice proceeds in Britain today almost without change. The courts still sit in London, and the judges still go their accustomed circuits through the length and breadth of the land, despite inevitable interruptions due to bombing and other causes. I suppose the historian of the future will record that for the first time in British history judgment was given in the basement of the court in an air raid shelter whilst the German bombers flew over the Strand.

But despite the inevitable interruptions due to causes such as this, the administration of justice proceeds without change.

One phase of the administration of justice is worthy of comment at this time in an audience of this nature. In time of war, the security of the state is the paramount consideration, and measures are enacted which are looked upon with some disfavor but which are generally accepted as being inevitable in time of war. The regulations made under the Defense of the Realm Act are very far reaching in their scope, the liberties of the people of Britain are in some degree surrendered in order that the larger liberty may live. But Parliament, as the home of the elected representatives of the people, has been jealous to see that whilst the security of the state is the foremost, the dominant, the paramount consideration, the rights of the individual must still be preserved, and the courts of law, even in time of war, have been most scrupulous to see that the executive does not step one inch beyond the sphere which Parliament itself has permitted.

In one of the Defense of the Realm regulations power is given to the Home Secretary to order the internment of any citizen if he has reasonable cause to believe that the citizen in question comes within one of the categories laid down in the regulation for the preservation of national security. When the regulations were first brought in and laid before the House of Commons so strong was the desire, even in the midst of war, to safeguard the rights of the individual that the government was compelled by the House of Commons to withdraw the regulation. That was at a time when the war, as viewed from Britain, was in a most critical stage. Nevertheless, whilst the dominant consideration was the security of the state, the eternal desire to see that individual rights were preserved was so strong that the government was compelled to withdraw the regulation, and today, under that emergency legislation, it is true to say no person can be interned under that order without having the right, of which he must be informed, of details given, the right to appear before a properly constituted tribunal to present his case and to have fullest opportunity, even in time of war, to show cause why the internment order should not be cancelled.

By the very nature of the case, of course, some modifications have to be made in procedure in time of war, but the spirit which animates its administration is exactly the same as in time of peace and exactly the same as administered in the courts of law. This is regarded not merely by the jurists themselves but by the government to be a matter of infinite importance, that all those proceedings should be conducted in accordance with the highest tradition of the courts of law, and it is a matter in which we, as lawyers, are entitled to take great pride, showing as it does the principles which animate the administration of justice in time of peace, that those principles are still regarded even in time of war as being important beyond all words.

Now, I have spoken in that way in order that you

should know that the spirit of the Common Law, with its insistence upon personal liberty and the sacred rights of the individual is still fully felt in Britain in these days.

It has been to me a source of the greatest inspiration to come to this side of the Atlantic, to a land where all those things which we so much value are jealously safeguarded. We believe in Britain that at this very moment we are fighting for the maintenance of these things. You would not need me to tell you that the people of Britain are not animated at this time by any thought of conquest or the acquisition of territory or material gain or any things of that nature. They are animated, in my judgment, by a very clear recognition never so clearly perceived in our history, that we are fighting for the things essential to our own way of life, as I believe them to be essential to yours, and, moreover, essential to the liberties of all mankind.

And that leads me to say this: This rejoicing of mine in being permitted to come to this side of the Atlantic, to experience the emotions which I have tried to put into words, I think, upon reflection, comes from the sense of contrast. In Europe, we have seen freedoms and liberties utterly die. In Europe, in land after land, we have seen them destroyed and we have seen them destroyed by people who wished to destroy them and by a mighty armed force the like of which the world hasn't seen, perform that dreadful deed.

The people of Britain, I say, feel that unless they stand, these things go with them, too. And in the streets of London, day by day, you see in uniform the Poles, the Czechs, the Norwegians, all the nationalities, symbols of that spirit which says, "This loss of liberty is only for a time," and I have faith enough to believe that the day is not too far distant when all those people, linked together by that strong desire for the restoration of these lost things, that in those lands where today liberty is gone, where people are oppressed and downtrodden, they shall, quickened by the breath of liberty, stand upon their feet an exceeding great army.

Therefore, these simple things which make up the way of life, these things which are so cherished by simple people, will live.

I wish I had time to illustrate the spirit of the British people. There is an old lady who lives in one of the bombed areas, and the desire of the authorities, of course, was to remove elderly people and children from these dreadfully devastated areas to a safer place. She refused to go. She had lived there all her life, and there she proposed to remain, and if a bomb came, well, there she would die. They said to her, "Why don't you want to go to a safer area?"

She said, "When the bombs begin to fall at night, somehow it takes my mind off the war."

Then, there is the little girl, when the house was bombed, taken out of the ruins, and with her brave, little, twisted face, saying, "Hitler won't make me cry!"

I would, were there time, speak to you of brave and simple people who, I believe, have not more courage than ordinary people but who are sustained by the belief about which I have spoken, that this is the time, this is the decisive moment when a stand has to be made for those things infinitely dear and infinitely precious which make up life.

Mr. President, ladies and gentlemen, I have tried to say in Canada and I would like to say to you here, that at this time a very great responsibility is placed upon the legal profession. These precious things for which so many people in so many lands are suffering in order to preserve them are in a high sense the special care, the special province of the law. A fearless, independent judiciary, an equally independent and fearless bar are still of supreme importance, and perhaps never of greater importance than now.

This was perhaps never better expressed than in that speech of your former president to which I have referred. He said then:

"But we owe our success in this enterprise as well as in the general administration of the law to the tradition of a fearless and independent Bench illustrating the supremacy of law, a tradition which is perhaps the most valuable part of the inheritance we have received from our common forbears. The spirit of the Common Law is incarnated in learned, conscientious and fearless judges. . . .

"But if we have maintained the tradition so happily received of an independent judiciary it is only because we have also observed the tradition of an independent Bar, not servile to authority, but always keen for the defense of individual rights against abuses of power."

We have before us the spectacle in the aggressor countries of subservient judges and a bar whose independence is gone. We have before us the spectacle of a secret police above the law and where the rights of the individual are non-existent. All those safeguards which protect our own lives and of which the law is the sure shield are at issue at this moment, and just as a very great responsibility is cast upon us, so also, I think, is a great opportunity given to us, and I am satisfied that lawyers on both sides of the Atlantic will not fail.

It is of course inevitable that my address to you should be colored at all points by the overmastering consideration that my country is engaged now and has been for two years in the most momentous war in its history. The essence of the Common Law is personal liberty, freedoms of the way of life, the sacredness—I use no other word—the sacredness of the individual. It is our common heritage; it is our common possession.

We in Britain believe that in this great conflict the spirit and traditions which animate the Common Law are at war with tyranny and destruction of sacred rights, and the spirit of the Common Law is the spirit which animates those simple people; it inspires them to endure to the end. And they are not without example. In the year 1667—observe the date!—one Thomas Sprat, then Bishop of Rochester, wrote some words about the

British people during another of their great afflictions, the great plague of 1667:

"It was indeed an admirable thing to behold with what constancy the meanest artificers saw all the labor of their lives and the support of their families devoured in an instant. The affliction, 'tis true, was widely spread over the whole nation, but those who had suffered most seemed the least affected with the loss; no unmanly bewailings were heard in the few streets that were preserved; they beheld the ashes of their houses and gates and temples without the least expression of pusillanimity. If philosophers had done this it had well become their profession of wisdom; if gentlemen, the nobleness of their breeding and blood would have required it; but that such greatness of heart should be found among the poor citizens and the obscure multitude is no doubt one of the most honorable events that ever happened."

Today the same constancy, the same devotion is to be observed, and it is a matter of pride that the things for which the people endure are in essence the supremacy of the law and those infinitely valuable things which perish when the law which secures them perishes.

Let me end as I began by expressing to you the exaltation of spirit which this visit has brought to me. Here if anywhere in the world the virtue of freedom and of individual rights is known and prized. In all our moving, surging history, from the far-off days of the settlers in their loneliness down to your teeming cities with your millions, freedom has always been upon your lip and freedom has always been in your heart.

Walk around the streets of this city of Indianapolis. Look at the brooding figure of Abraham Lincoln. Look at the tablet in the wall, of the observations he let fall as he passed through this city on the way to the Capital. To a man of my training, my tradition, my reading, my background, it is inevitable that one should be drawn closer to the great spirit of Lincoln, of whom Emerson said, "His heart was as large as the world," and to observe more closely the compassion, the infinite understanding and the words which he spoke, so applicable, so apt, for this day. To Congress he said, "We cannot escape history. No personal significance or insignificance can spare one or another of us. The fiery trial through which we pass will light us down in honor or dishonor to the latest generation. We shall nobly save or meanly lose the last best hope of earth."

And let me leave with you those words of one of our English poets, quoted by the British Prime Minister to the people of Britain, words which are applicable to us all and which contain and convey the inspiration and the hope which never dies:

Say not the struggle naught availeth,
The labor and the wounds are vain
The enemy faints not nor faileth,
And as things have been, they remain.

If hopes were dupes, fears may be liars:
It may be in yon smoke concealed,
Your comrades chase e'en now the fliers,
And but for you, possess the field.

For while the tired waves vainly breaking
Seem here no painful inch to gain,
Far back through creeks and inlets making.
Comes silent, flooding in, the main.

And not by eastern windows only,
When daylight comes, comes in the light.
In front, the sun climbs slow, how slowly,
But westward, look, the land is bright.

. . . The audience arose and applauded. . . .

AT THE ANNUAL DINNER

Hon. George Wharton Pepper, Sir Norman Birkett, President Lashly and Mr. Justice Jackson

Administrative Law Symposium

At a joint session of the National Conference of Judicial Councils and the Section on Judicial Administration held in the Auditorium of the World War Memorial in Indianapolis, procedure before administrative tribunals was discussed by the Honorable Francis Biddle, United States Attorney General, who explained and supported what is known as the Report of the Attorney General's Committee. Dean Pound replied, supporting what has been called the minority report, signed by Messrs. Vanderbilt, Stason and McFarland, each of whom also signed the majority report. The so-called minority report was also, in principle, supported by the separate report of Chief Justice Groner of the Court of Appeals of the District of Columbia, who also signed the majority report.

In view of the great importance of the subject, the length of time during which it has been debated at our meetings, and because committees on the judiciary of the upper and lower house are giving consideration to the various pending bills on Administrative Procedure, the addresses of the Attorney General and Dean Pound are printed here in full.

This discussion, before an audience which filled the Auditorium to overflow, commanded the close attention of those who heard it.—ED.

ADMINISTRATIVE PROCEDURE LEGISLATION*

By HON. FRANCIS BIDDLE
Attorney General of the United States

I PROPOSE to discuss before this conference the bills regulating administrative procedure which are now pending before a subcommittee of the Senate Judiciary Committee.

Representing both the Attorney General's Committee on Administrative Procedure and the Department of Justice, I appeared before this subcommittee and testified at some length, giving my views of these proposed statutes. I was a member of the Attorney General's Committee *ex officio*, and was active in drafting the bill recommended by the majority members.

You will remember that Attorney General Cummings first suggested the plan that a study should be made and that this was carried out by Attorney General Murphy and Attorney General Jackson, resulting in the report of the committee. Let me emphasize the fact that this report in substance was unanimous. The extent and method of the control to be exercised led to differences of opinion which I shall discuss. But the report and the accompanying monographs, which are studies of particular agencies, form the basis of all future legislation. The process of regulation is a continuing and flexible one. As Professor Hart of the Virginia Law School wrote in reviewing the study: "It is the most thorough and comprehensive study of Federal Administrative Procedure that has ever been made."

The subcommittee, chairmaned by Senator Hatch, has given a great deal of time and has heard a great number of witnesses on the bills. The American Bar Association has been ably represented, and several of the members of the Attorney General's Committee have testified with respect to all of the solutions suggested.

Three bills are proposed: S. 675 is the bill suggested by the majority. This is the bill that I favor. S. 674 is the bill suggested by three minority members of the committee of eleven. The third bill, S. 918, was introduced by Senator Hatch at the request of some of those who had been supporting the old Walter-Logan Bill, which the President had previously vetoed on the ground that it

*Address delivered before American Bar Association at Indianapolis Meeting, September 29, 1941.

was hasty legislation to which careful and proper consideration had not been given. At the time of the veto, the Attorney General's report had not been completed. Of the 83 witnesses who appeared before the subcommittee, none advocated the enactment of bill S. 918. This bill does not, therefore, have the support of any substantial group of the public or of the bar. I, therefore, propose to confine my remarks to the bills expressing the views of the majority and minority reports.

Let me say at this juncture that my attention has been called to newspaper stories announcing a debate between myself and my very learned friend, Professor Roscoe Pound, former dean of the Harvard Law School. I think it inappropriate for the Attorney General of the United States, having given his views before the Judiciary Committee, to enter into a "debate" on the subject. I am outlining my views here with the hope that closer cooperation between the American Bar Association and the Administration may result concerning these important issues. The differences between the two bills—S. 674 and S. 675—are not, I believe so fundamental that they cannot be bridged; or, at least, these differences are differences in methods of solving the problem rather than disagreements concerning its existence.

Before coming to a discussion of the bills themselves, I should like to say a word or two as to the approach to the problem. Two considerations, surely, must govern, not necessarily conflicting but each emphasizing a point of view which may necessitate, in any particular instance, a different approach. The considerations are those of private interests, on the one hand, and of effective governmental action, on the other. It is as important that private rights be secured under administrative practice as that they be secured in court procedure. But it is equally vital that the effective work of the administrative tribunals be conserved and strengthened. It is not unnatural, therefore, that we find that lawyers whose practice necessarily is based on the representation of individual interests often conflict in this field with members of the government whose main consideration is the efficient operation of administrative and other governmental agencies. This, of course, is an oversimplification of the problem. I do not mean to suggest that the government is not interested in protecting "private" interests; but I do mean to point out that the procedure, in any case, may depend largely on the emphasis which is placed on the rights of the litigant rather than on the rights of the community. The provisions of any bill must at once protect private rights and make administration effective. Neither consideration should be allowed to be emphasized in a manner disproportionate to the other.

With this in mind, I turn to the bills. First, let me emphasize what I consider the most important proposal of the two bills and on which there is an agreement between all the members of the Attorney General's Committee. I refer to the creation of the Office of Federal Administrative Procedure. Remembering that agencies become quickly alphabetical, I hesitate a little over the name. Perhaps "OAP" would be more convenient than "OFAP". But as to the merits of the Office there can be no disagreement. Studies of administrative procedure in the past have been somewhat spasmodic. But the Office affords a superb vehicle for a continuation of the work done by this Association and by the Attorney General's Committee.

Although the Office has no general mandatory powers over the agencies, and its function is to study and advise, it can counsel, coordinate, and perfect. During our work, the members of the Committee were impressed by the readiness with which agencies accepted our detailed suggestions. Many of the administrative defects have, as a result of these recommendations, now disappeared. The agencies cooperated with us in seeking out and eliminating improper practices. This cooperation would surely continue if such an Office were created. It is most important to narrow the field of general charges of improper bureaucratic methods into specific instances, which analyzed and isolated, can readily be terminated. The Office itself, and the members of this Association too—for under the bill the Office's doors must be open to complaints and suggestions of all who deal with agencies—can study these inequities, and they can propose remedies. This is not merely a prophecy for in the past three years we have had an opportunity of seeing the admirable effects of the creation of the Administrative Office of the United States Courts. The Administrator has no power to force judges to try cases expeditiously. Although at first a certain uneasiness existed in the minds of the federal judges that some of their powers might be impinged on, the work of this Office has resulted in the most admirable cooperation. I have recently been presented with a confidential draft of the last report from this Office and I am happy to say that court dockets are, in most instances, being much more promptly cleared and that the creation of the Office has very greatly aided the situation. I think we tend, in approaching these problems, to underestimate the immense value of this continuing cooperative relationship, even where the Administrator is not given specified powers over the agencies involved.

The next major portion of the majority bill deals with administrative rule-making. In respect of actual procedure, both the majority and the minority bills agree in retaining a considerable degree of flexibility. In contrast to the old Walter-Logan bill, and to the present S. 918, neither S. 674 nor S. 675 impose a rigid requirement that hearings precede the issuance of rules. This omission, the entire Committee agreed, is a wise one. Types of rules, the circumstances under which they are issued, the number and organization of the people whom the rules affect,

the subject-matter which they concern—all are too varying to permit of the prescription of any single procedure.

But both majority and minority bills do insist on complete availability of administrative information, so that people will know whom to see and where. Both insist on publication of crystallized policies, on announcement of rules in the Federal Register, on organized units within the agency to devote attention to the perfection of rules and the receipt of suggestion from outsiders. I do have difficulty, however, with several of the provisions of the minority bill which, perhaps inadvertently, at least seem to point in the direction of mandatory rule-making. S. 674, for example, includes in its declaration of policy a statement that agencies "shall, as a fixed policy, prefer and encourage rule-making in order to reduce to a minimum the necessity for case-by-case adjudications." It also requires agencies to exhaust their rule-making powers "as rapidly as deemed practicable", and agencies cannot, apparently, act in a particular case unless a specific rule has been issued to cover the case.

While I appreciate the convenience of certainty in the law, I think it unwise and undesirable to make the exercise of the rule-making powers obligatory. The functions of administrative agencies are as various and as different as the whole gamut of human affairs. The common law was built up by a case-by-case accretion of principles. One of the most luminous insights which has influenced the development of our legal system is a recognition of the wisdom inherent in the construction of legal principles by proceeding slowly and gradually from case to case and not seeking to lay down in advance legislative commands to meet every possible demand upon the legal system. Experience must precede codification and rule-making; it cannot trail after formulation of principles. The common law does not define fraud or negligence or duress. Why, then, should we demand that the Federal Trade Commission define in advance what is unfair trade competition, or the Labor Board specify what is discrimination in regard to hire and tenure of employment?

Once cases have been decided by agencies, once principles and policies have become crystallized and formulated, they should be made public and available. This is what S. 675, the majority bill, provides, and this is as far as it goes. To go further, as S. 674, the minority bill, seems to do, is to place a premium on the issuance of rules for the sake of issuance, to lead to rules which cannot be carefully considered and cannot have the vital groundwork of reality and experience. I cannot believe that such provisions would, in the long run, serve the interests of private citizens.

But let us pass on to the next major subject with which these bills deal—that of adjudication—the decision of particular cases. Now I am sure that the first thing which comes to your minds is the phrase—"judge, jury, prosecutor." That, I think unfortunately, is the slogan which attracts all the discussion, and diverts attention from more concrete and more real difficulties. First, it should be recalled that only in a minority of agencies is there "prosecution" at all. Expressed disciplinary action by an agency on its own motion is an important, but numerically minor phase of administrative activity.

But even then, where there is such "prosecution," there is ordinarily a combination of functions only in an abstract sense. For an agency is not one, but many people, and many divisions. We do not say that an indicted criminal is prosecuted by the United States, and that the United States is the judge too—even though the United States appoints both officers. On a smaller scale, of course, that is the usual organization in an agency. One group of employees investigates and prosecutes, another decides. Each is compartmentalized and separated from the other—often geographically as well as in terms of organization.

I do not mean to say that even the theoretical division ought not to be carried further, but that, even though functions are combined in an agency, it does not happen that the same person exercises both functions. So I think that the problems of administrative adjudication can better be solved by a shift in emphasis away from the conceptual approach of combination of functions to the actual method of decision.

This, indeed, has been the approach of both the majority and the minority bills. Neither proposes a rigid, formal and external separation of the prosecuting and deciding functions of all agencies. Both agree that general supervision over the policies of an agency should be preserved in its heads. Both agree that internal rearrangements provide the immediate solution. For we recognized that there are deficiencies in the adjudicatory process; and that there was a tendency toward a dilution of responsibility in the deciding process. Trial examiners, who hear the testimony and see the witnesses, have often, for one reason or another, not been of the highest calibre and ability. They have played too small a part in the decision of the case. As a result there appeared the further obstruction of anonymity. Since the trial examiner's role in the deciding process has been diminished, and the agency heads themselves obviously cannot assume the sole burden of hearing witnesses, reading the records, and deciding the cases, these tasks have been shifted to others—review attorneys or the like. However able these men may be, they are not in the best position to decide the case. The record is cold; they have not lived with the case as it developed in the field; and though they played an important part in deciding, they have been sheltered from responsibility. Attorneys representing the individual citizens have never seen them, have never had a chance to present their arguments to them face to face, but instead have presented their cases and arguments to examiners who are often mere conduits. Small wonder that they should feel baffled.

It was this sort of difficulty, plus, of course, the desirability of further assuring internal separation of functions, which led us to recommend the hearing commissioner system—upon whose general outlines, the majority and minority bills agree. The hearing commissioner scheme is directed to the end of obtaining men to hear and decide cases in the first instance who will be able, well-paid, and, although an integral part of the agency, still independent. It is probably unnecessary for me to describe in detail the mechanics suggested by the bills for the achievement of this end. Salaries are to be fairly high so that better men can be recruited. The agency may nominate them, but they are appointed by the Office of Federal Administrative Procedure. Their tenure is fixed; they are removable only for cause and only by the Office. Their independence is real. And their decisions are to be final in the absence of appeal; and even in case of appeal, their findings of fact must be given great weight by the agency heads.

Now it has been suggested—and the proposal is embodied in the minority bill—that the salary range for hearing commissioners be made more flexible. From the standpoint of administrative efficiency, this might be advisable, particularly in the light of the wide variety of adjudications in the several agencies, and even in a particular agency. But if the agencies can control the salary of the hearing commissioner, even within the limits of a sliding scale, there is at least a potential threat to their independence.

As for the next major area of administrative procedure—judicial review—it is to be noted that except for a section dealing with venue, and one dealing with the record on appeal to the courts, S. 675, the majority bill, is silent on the subject. The minority bill, on the other hand, includes detailed sections dealing with judicial review. But I find it difficult to discuss these sections of the minority bill since I am uncertain what they mean. If the minority bill is simply a restatement of existing law, there really is not a great difference between the two bills. If the minority bill does more than restate, I am unable with certainty to ascertain the precise extent to which and the precise manner in which its provisions go beyond existing law.

I wish to make clear that I am not opposed to judicial review. Judicial protection against administrative action which is beyond legal authority is, I believe, basic to our system of government. But I do not believe that effective blanket legislation is feasible. My difficulty with the provisions of S. 674 concerning judicial review is that their effect is uncertain and unpredictable. Congress has in the past made purposive selection of alternative methods for, and scope of, review. I think that the only real solution to the problem of judicial review is to continue individual scrutiny and to amend those particular statutes which may be found to be inadequate, for there are very few statutes which omit a specific review procedure. In instances where there has been such omission, the courts have always found methods of reviewing the administrative decision where advisable. The Bar and the courts understand the provisions of the statute and have applied them, speaking in a general sense, to confine review to correct errors of law but not to permit the substitution of the court's inferences of fact for those of the administrative body. I believe that it would very seriously impair the effectiveness of administrative tribunals to broaden the scope of review in such a manner as to change this well-understood distribution of functions. One of the main reasons against such a change is that it would burden the courts with endless administrative matters properly belonging to the agencies.

You will see that, thus far, the majority and the minority bills are not in very great disagreement. Aside from differing details, the real difference between them, however, is the "code" form which the minority bill takes. And it is with that that I have the most serious difficulties. The authors of the minority bill—and originally, in fairness to them, several members of the majority too—were attracted by the idea of a code. It would be utilized as a guide to the agencies, and its effect would be salutary. But those of us who approved the majority bill ultimately came to the conviction that a legislative code was, after all, not feasible in fact, however attractive in theory. Either excessive rigidity would result, imposing requirements applicable to some agencies, wholly inapplicable to others; or the bill would be inflated with exhortations and generalities. I think that both results appear in the minority bill.

The statute proposed by the minority report is full of general and unenforceable exhortations. Take, for instance, Section 110 of the bill which reads: "Any member, officer, or employee of any agency who violates the mandatory provisions of this act, shall, other laws to the contrary notwithstanding, be subject to disciplinary action, demotion, suspension, or discharge from the public service." But what provisions of the act are mandatory?

For instance, Section 206 of S. 674 provides: "Prior to the making of rules or the utilization of any of the procedures provided by this title, each agency shall conduct such preliminary non-public investigations as will enable it to formulate issues or proposed, tentative, or final rules." The section speaks in mandatory language; and yet should the officer be disciplined for not conducting preliminary investigation? Again, Section 309 (m)(4) says: "In the consideration and decision of any cases, hearing or deciding officers shall personally master such portions of the record as are cited by the parties." I shall not comment on this provision except to say that I am glad that it does not apply to the Solicitor General in his arguments before the Supreme Court. When I made a similar remark before the subcommittee, Senator O'Mahoney said "I wish there was some power which would compel me to master this record."

I think that we have two better guides than the proposals which

appear in the code. One is the Final Report itself, with its general and specific recommendations. The second is the Office of Federal Administrative Procedure, which can find the evils when they arise, and make recommendations as they are warranted. These two vehicles together can provide the necessary guide for administrators without the dangers of the over-rigid prescription or the over-general exhortations of which the minority bill falls afoul.

For, after all, I think we are just beginning. Administrative procedure is maturing, but what is still more important, the study of the field is just now maturing too. Before, we had to talk—and to reform—in the dark, basing our ideas on more or less haphazard information and isolated personal experiences with particular agencies. But now, for the first time, we have gathered together comprehensive materials—the 27 monographs of the Attorney General's Committee. And through the Office of Federal Administrative Procedure, we have the machinery for continued study and development.

I think it urgent that we do not permit our attention to the field of administrative procedure to die at this stage. We have come this far; we have made a start. It would be a waste of energy to let our efforts stop here because we cannot agree precisely on what to do. Nor do I think that the urgency is less because of the present international crisis and its domestic reverberations. On the contrary, it seems to me that these very factors make it more imperative than ever that we—you of the Association, we in the Government—cooperate and continue in our efforts toward improvement in the field.

For it must not be forgotten, as has been pointed out by one of my colleagues on the Committee, Professor Fuchs, that after all administrative justice is an alternative not only to judicial or "court" justice but also to a far more fluid and swift-moving executive justice. The present emergency has, more and more, brought with it an emphasis on executive action, just as it did in the last war. And this executive action is not, and cannot always be accompanied by the procedural safeguards for which we have been striving.

But we cannot be certain that, when the emergency is over, there will be an abandonment of executive justice. The same problems, the same maladjustments, which gave rise to the increase of administrative agencies in 1929, are likely to remain, and indeed may be present in even more acute form with the end of the emergency. Old social problems will be accentuated; new and urgent problems of reconstruction and adjustment will appear.

To meet these problems, the house of administrative justice must be set in order now, not when the problems have run beyond us. Administrative justice must be improved and perfected to make it ready to deal with what is on the horizon. It must be so fitted that it can deal with the future adequately and quickly; safeguards, indeed, there must be, but administrative procedure cannot be so loaded with technicalities, be so encumbered with litigious details, that it cannot cope with the swift moving demand. The public will not long be patient with inadequate machineries.

The responsibility is ours. We must all meet it. We cannot allow our attention and our energies to be divested by disagreements over degrees and details. As a flexible and effective beginning on our course, I suggest that S. 675 in its general outlines, at least, is our greatest hope.

FOR THE "MINORITY REPORT"*

By ROSCOE POUND
Dean Emeritus Harvard Law School

WHAT led up to the report of the Attorney General's Committee on Administrative Procedure and the differences of opinion therein which we are arguing today? I submit that it was a general, growing and increasingly acute dissatisfaction with the procedure and methods of administrative agencies on the part of the profession and the public. On the other hand, the Attorney General, then Solicitor General, in his testimony before the sub-committee of the Senate Judiciary Committee, was inclined to attribute what led up to the Committee report and the agitation which led to passage of the Walter-Logan Bill by both houses of Congress, to certain controversial doings of one particular agency. After all, he thought, that particular agency was carrying out the policy of Congress even if somewhat over zealously. In general, the procedures of the different agencies were as sound as could reasonably be expected and afforded no ground for much legislative correction. But before the agency in question was set up, the American Bar Association had been at work upon the subject. One need only read the reports and discussions for years back to see that the profession has been more and more aroused not by the procedures and methods of one or two administrative agencies but by certain characteristics of all administrative adjudication and administrative rule-making. Indeed, some of these characteristics were manifest two decades ago in administration of the National

*Address delivered before American Bar Association at Indianapolis Meeting, September 29, 1941.

Prohibition Act. We start, then, with different views as to the seriousness of the conditions to which the report is directed.

Although we are speaking of federal administrative procedure, it should not be overlooked that the problem is much broader than one of federal agencies. The same conditions, the same procedures and methods are to be found very generally in state administrative agencies. Everything that stands out as we read the cases in which the courts have had to review the action of the one stands out equally in the reported cases of review of the other. Effective federal legislation has therefore an especial importance at this time since it is needed not only to better the situation as to federal agencies, but quite as much to serve as a model for useful and much wanted state legislation.

Characteristics of Administrative Justice

In order to understand what it is that we are discussing we must look at those characteristics of administrative justice, manifest not only in this country but in England and in the British Dominions, which have led in the United States to increasingly strong demand for legislation. The Monographs prepared for the Attorney General's Committee are filled with examples of these characteristics in action. But the examples are treated usually as something peculiar to the particular agency under consideration. Nor does the report of the committee seem to me sufficiently to recognize that it is dealing with general characteristics of administrative justice which admit of general treatment by legislation and a general system of review, quite as feasible as the uniform mode of simple appellate procedure now being adopted throughout the land for every variety of controversy that comes before the courts.

What are these characteristics of administrative adjudication? The more significant ones for our purpose may be summed up in seven tendencies.

Failure to Hear Both Sides

First and most serious among these tendencies is one going counter to what has always been the first principle of judicial justice, namely, to hear both sides fully and with scrupulous fairness. In administrative adjudication there is everywhere an obstinate tendency to decide without a hearing, or without hearing one of the parties, or after conference with one of the parties in the absence of the other whose interests are adversely affected. There are many such cases in the English reports.[1] In a significant Australian case an administrative Court of Marine Inquiry cancelled a pilot's certificate on the basis of a reconstruction of maneuvers of vessels in a collision in the absence of the pilot and without his knowledge.[2] Examples in the reports of our federal courts are numerous.[3] One may find such cases in almost every volume of the law reports of our several states.[4] Examples are not wanting in the Monographs submitted to the committee. For example, we are told that an investigation by the Railroad Retirement Board "is not necessarily a complete one in that all sides may not be notified."[5] Indeed, it is the unanimous report of the committee that too frequently notice is inadequate. The administrative agencies, it is reported, frequently fail to apprise respondents fully of what they have to meet so as to permit adequate preparation of their defenses. As the report adds, notice ought to "fairly indicate what the respondent is to meet."[6] How obstinate this tendency is may be seen from a case where, although the statute required a hearing, the commission made orders without notice or hearing and sought to obtain a ruling from the court that they were not necessary.[7] Aversion to hearings on the part of administrative agencies is abundantly shown in the Monographs, the report of the committee, and the testimony taken by the Senate sub-committee.[8] After reading the Monographs one cannot but feel that administrative agencies tend to consider that hearings and arguments before them are, as Terence Mulvaney put it, "a shuparfluous and impartinent nicissity." The statutes often prescribe them and the courts require them, but they are not to have any controlling influence upon determination of facts.

Private Consultations and Undivulged Reports

A second tendency is to make determinations upon the basis of consultations had in private or of reports not divulged, giving the party affected no opportunity to refute or explain. The law reports are full

1. Significant cases are: *Rex v. Housing Appeal Tribunal* (1920) 3 K.B. 334, 342, 344; *Errington v. Minister of Health* (1935) 1 K.B. 249, 280-281; *Cooper v. Wilson* (1937) 2 K.B. 309, 345.

2. In re Evans, 52 New South Wales Weekly Notes, 1 (1934).

3. Some of these are cited in the Report of the Special Committee on Administrative Law, 63 A. B. A. Rep. 333, 346-7 (1938). Very recent cases involving federal administrative agencies are: *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, U.S.C.A.D.C., February 3, 1941, where orders injuriously affecting valuable rights were made without hearing the parties affected and application for hearing was thereafter denied; *Brown Radio Service & Laboratory* v. *Federal Communications Commission*, U.S.C.A.D.C., February 3, 1941 (The opinion of Stephens, J. in note 1 sets forth the arbitrary denial of hearing).

4. *Central But Operators, Inc.* v. *Central Ave. But Owners' Assn.*, 128 N.J. Eq. 177 (1940) in which there was deprivation of a substantial property right without affording opportunity to be heard in defense thereof; *Wolgamut* v. *Vinegar Hill Zinc Co.*, 151 Kan. 374 (1940), in which an order was made without notice to a party affected; *Matter of Lipschitz* v. *Mealey*, 259 App. Div. (N.Y.) 640, 642 (1940), in which testimony of two witnesses was taken in the absence of the party affected and without any opportunity on his part to cross-examine; *Derby* v. *Southern R. Co.*, 194 S.C. 421, 441 (1940), in which a public service commission was held bound to have a hearing before requiring a certain type of service; Atchison, T. & S. F. R. Co.'s Protest, 44 N.M. 608, 614, (1940) where decision was rendered on a partial hearing.

5. Pt. 8, p. 11.

6. Report of the Committee on Administrative Procedure, pp. 42-43.

7. *Saxton Coal Min. Co.* v. *National Bituminous Coal Commission*, 96 Fed. 2d. 517 (1938). Such ideas are characteristic of proceedings conducted by laymen. *Brooks* v. *Engar*, 259 App. Div. (N.Y.) 555 (1940) in which a member of a voluntary association was expelled on the testimony of a witness whose identity and testimony were withheld from the member expelled.

8. See, e.g. Monographs, pt. 11, p. 29; pt. 12, p. 26—the administrative agency feared that if it had to have a hearing it would not have a record to sustain its order if challenged in court; pt. 13, p. 33.

of illustrations of this.[9] The Monographs are replete with examples. In the Federal Alcohol Administration "no attempt is made to withhold from the administrator any extra-record information bearing on cases awaiting decision."[10] In the administration of the Grain Standards Act the official in charge of General Field Headquarters "considers the record and report and, if he wishes, *consults supervisors or others familiar with the subject matter and obtains their views.*" Such consultations are often had by correspondence.[11] The Railroad Retirement Board, in about one-third of the cases, after the hearing seeks new evidence "Usually by correspondence or field investigation."[12] In foreign fraud order cases the respondent knows nothing about the proceedings till he inquires why no mail comes to him. Then he finds an order has been issued against him. But he is only allowed to see the findings of fact, which are in general terms. He is not allowed to see the files or learn the specific evidence against him.[13] Sometimes administrative orders are based "almost exclusively on reports of investigation and the statements of the agency's own examiners."[14] It should be noted particularly that in some of these cases there is no power to administer oaths and so no safeguard against perjury.[15] The Federal Trade Commission makes its decision on a record of the evidence taken, with no report of the trial examiner, and after decision and order refers the case back to the trial examiner to make findings of fact in accord with the decision.[16] But the trial examiner has not heard the oral argument nor participated in the decision.[17] So the decision is made without findings of fact and the facts are found afterward by one who did not hear argument. Naturally the findings are commonly in the words of the complaint.[18] In the administration of the Grain Standards Act there is no oral argument before the examiner or before the official in charge of General Field Headquarters. On review, there is no provision for briefs. They get into the hands of whoever has the papers at the moment and are attached to the files.[19] Of one mode of proceeding in forfeiture cases we are told in the Monograph that after the elaborate preliminaries the hearings are nothing but "the statutory addition of an otherwise unnecessary nail in the coffin."[20] This attitude is typical of those whose primary interest is in administration. In the Post Office Department in fraud order cases the respondent's oral argument "is made either to the hearing officer, who does not finally make the findings, or the solicitor, who has not heard the evidence and has not yet become familiar with the record. Thus, in effect, if the respondent in a fraud order case chooses to argue before the hearing officer, he is not addressing his argument to the crucial person who decides; if he chooses to argue before the solicitor, he cannot argue against or upon any defined finding or opposing position, since none has been presented to the solicitor."[21] After reading the Monographs one cannot escape a conviction that many administrative agencies regard a hearing as a mere form to create an appearance of complying with the requirement of due process of law.

Determinations Without Basis in Substantial Evidence

Third, there is a tendency to make determinations of fact seriously affecting individual rights without a basis in substantial evidence or in any evidence of rational probative force, much less sustained by the reasonable weight of the evidence as a whole. Indeed, one of the most serious features of administrative justice is a tendency to find the facts not on the basis of hearing and evidence but on the basis of preconceptions of the facts to fit the assumed exigencies of a policy. One might in this connection refer to some of the determinations of the National Labor Relations Board in the past. Many examples which are no longer controversial may be found in findings of prohibition administrators under the National Prohibition Act. An illustration may be found also in the Monograph setting forth the procedure of the Federal Communications Commission. We are told that "the distinction between the determination of issues of fact and questions of policy has not been made by the commission either in theory or in practice."[22] In other words, the policy finds the facts to which the

9. A significant English case is *Errington* v. *Minister of Health* (1935) 1 K.B. 249, 280-281. Typical cases in the federal courts are: *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93 (1913); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 300-301 (1937) in which the commission withheld and refused to reveal the evidence on which it acted and concealed the evidential facts on which it purported to take judicial notice of the information on which it acted—there is a strong opinion by Cardozo, J.; *Morgan* v. *United States*, 304 U. S. 1, 14-15, 17, 19-20 (1938), where there was action on the basis of findings which the parties affected were not given opportunity to examine—there is a strong opinion by Hughes, C.J.; *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 96 Fed. 2d, 564, 566-567 (1938) where action was taken on a report as to what "a large number of people" had said, with no opportunity of cross-examining those whose opinions were received at second hand. Examples in the latest state reports are: *Matter of Smith* v. *Rosoff Tunnel Inc.*, 259 App. Div. 617, 619-620 (1940) where an order was made on a private consultation of the medical staff, with no possibility of cross-examination; *Wallace* v. *North Dakota Workmen's Compensation Bureau*, 69 N. D. 165, 169-170 (1939) where there was a refusal to allow examination of the papers on which an order terminating an award was made. As Professor Wigmore puts it, a special danger of infraction of the "fundamental rule" requiring disclosure to a party of what is to be the basis of an order affecting him "is found in proceedings before administrative officials." 9 Wigmore, Evidence 3 ed. § 2569.

10. Pt. 5, p. 27.
11. Pt. 7, p. 13.
12. Pt. 8, p. 23.
13. Pt. 12, p. 36.
14. Pt. 13, p. 33.
15. Ibid.
16. Pt. 6, pp. 26-27.
17. Id. 27.
18. Id. 29.
19. Pt. 7, p. 13.
20. Pt. 9, p. 31.
21. Pt. 12, p. 35.
22. Pt. 3, p. 35. A recent example in the state reports may be seen in *Taylor* v. *Cornett Lewis Coal Co.*, 281 Ky. 366, 368 (1940). The crucial question of fact was whether an employee had accepted the provisions of a statute. His name was not on the registry of those who had accepted, but there was a report of the accident in question made to the board, upon its repeated insistence, in which it was positively stated that the employee had not accepted. On the sole basis of the employer's having reported the accident, the board found that the employer had accepted the provisions of the statute. Obviously the policy found the facts. The reports are full of such cases.

policy is to be applied.

Policies Outside of the Statute

A fourth tendency is to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote supposed social ends to which the legislative body might or might not agree. Some late examples from the current reports may be cited.[23] As a witness said before the subcommittee of the Senate, there is a general tendency of an administrative agency, when it administers a statute, "to feel that the bill enacted by Congress is merely the starting point from which to push forward into new fields. They try to extend the jurisdiction and enforce their own ideas in all possible ways."[24] One board was found to have repeatedly exceeded its authority by "arbitrarily substituting its autocratic judgment for the Congressional mandate."[25]

Policy Determining Facts

Connected with this last tendency and with the one to decide without any basis in substantial evidence, is a fifth tendency, namely, to determine facts not on the basis of hearing and evidence but on the basis of preconceptions or assumptions of facts to fit the assumed exigencies of a policy. It is said by a writer on administrative law that the adjudication must support the policies of the administrative agency.[26] But note how this proposition works. The Federal Communications Commission changed its procedure because "the examiner's report frequently failed to represent the views of the Commission as reflected by its legal and technical staff"[27]—that is, the report of the examiner who heard the evidence did not adjust itself to the preformed decision. There is a tendency to identify in advance one side of a controversy with the public interest and to find the facts accordingly. This tendency is the more likely when the administrative agency combines undifferentiated investigating, prosecuting, and adjudicating functions. Under such a combination of functions it is not easy to realize that the policy is to be applied in determining the legal effect of the facts under the statute, not to determining the facts.

It is interesting to note in this connection that while in one breath we are told that analytical distinctions as to administrative functions are useless, in another we are told that a distinction must be made between administrative agencies whose business it is to detect and prosecute violations of the law and those which fix rates or decide policies for a particular industry. The former act quasi judicially. The latter act administratively.[28] This is true enough. In the former the standards of fair hearing and the ethics of decision of controversies apply. In the latter the question is one of due process in the sense that the resulting orders must not be arbitrary and unreasonable. But in those cases what is reasonable must depend on ascertainment of facts, and there are certain fundamental requirements of fair play and support of the ascertainment of facts by evidence of at least rational probative force which cannot be suffered to be overlooked.

Undifferentiated Finding of Facts and Law

Another closely connected tendency, growing out of the setting up of administrative agencies to investigate, prosecute, and adjudicate, is one to make no separation of facts and law, or of facts, law, and policy to be applied to facts. In all legal systems the history of appellate procedure shows the importance of separating ascertainment of the facts, as a process, from ascertainment of the applicable law and application of the ascertained law to the facts. Progress in reviewing procedure has largely taken the form of perfecting this separation. In the common-law system this progress has been slow and difficult because of the general verdict of the jury in which for a long time the three were wrapped up in one pronouncement. That general verdict grew out of the exigencies of primitive procedure in which there was a mechanical mode of trial of a single issue. Recently there has been widespread assertion of a doctrine that finding of facts and finding and application of law cannot be separated. For the most part, this assertion is a phase of the recrudescence of absolutism, conspicuous in all parts of the world in the last decades. It is urged chiefly abroad by those who hold that law will gradually disappear and believe in a regime of administrative orders. In this country it is urged chiefly by advocates of administrative absolutism of whom the Attorney General certainly is not one. But the idea stands out in more than one of the Monographs and serves to hold back the majority of the committee from recommending any effective legislation. Undifferentiated finding of facts and finding and application of the law thereto is the method of the personal justice and mechanical modes of trial which characterize the beginnings of a legal order.

The Same Problem in Judicial Procedure

We are told in the Monographs that the Federal Communications Commission "convinced that there was no merit in segregation of functions in its work and a good deal to be gained by scrapping the distinction between prosecuting and judging a case" adopted its system of pronouncement upon a case as a whole with no discriminations of fact,

23. *Matter of Dusinberre* v. *Noyes*, 259 App. Div. (N.Y.) 582 (1940) where there was a decision on a policy not committed to the administrative agency and contrary to the provisions of the statute defining its powers; *Puhle* v. *Pennsylvania Public Service Commission*, 139 Pa. Super. Ct. 152, 158 (1939) in which the commission sought to impose conditions not warranted by the statute.

24. Hearings on Administrative Procedure, U. S. Senate, Subcommittee of the Committee on the Judiciary, p. 1294.

25. House Rep. No. 3109, 76th Congr. 3d Session, pt. 1, pp. 149-150.

26. Landis, The Administrative Process, 99.

27. Monographs, pt. 3, p. 28. See also id. p. 35.

28. Testimony of the Solicitor General, Senate Sub-committee Hearing, p. 1451.

policy, and law.[29] In the Report of the Committee we are told that as a general policy there ought to be at least a separation of functions within each agency.[30] But the majority are inclined to emphasize the difficulties and not perceive that here is the better reason for insisting upon adequate judicial review. We have had the same problem in judicial procedure. The colonial courts in the seventeenth century rendered judgments upon general verdicts of juries to whom the case was turned over as a whole. But as lawyers of training and ability came to practise in them and sit as judges there was continually increasing separation of law and fact. Demurrers to the evidence, cases stated, reservation of points of law at the trial and special verdicts came to be used. In England, the practice grew up of putting special questions of fact to the jury and upon the answers given directing what the general verdict should be. On the basis of recent philosophical ideas some professors are now telling us that what we have learned to do in long experience in English and American courts is theoretically impossible. Perhaps the best commentary on this teaching is William James's saying that the worst enemies of a subject are the professors thereof.

Adjudication by Prosecutors

All of the foregoing tendencies are given increased scope for operation in action by the effect of combining or not differentiating the receiving of complaints, investigation of them, bringing and conducting a prosecution upon them, advocacy before the agency itself in the course of the prosecution, and adjudication. Thus the adjudication becomes one by or with the advice and assistance of those who investigated, prosecuted, and were advocates for the prosecution. Members of legislative bodies have often borne witness that their constituents expect them to forward complaints to administrative agencies which are authorized to receive the complaints and are then to investigate, prosecute, and judge. Such things are in manifest derogation of the maxim that no one is to be judge in his own case. The effect of it has been noted by courts.[31] The extent to which this fundamental maxim is habitually violated appears fully in the Monographs, and is, indeed, recognized in the report. In the administration of the Walsh-Healey Act, the trial attorney represents both the division and the complainants, and the trial examiners consult with him before making their reports.[32] In the Federal Communications Commission, usually the attorney who "has worked on the case from its very inception" presides at the hearing. He discusses the case with other members of the staff throughout the hearing and after the hearing in the preparation of the decision.[33] In some administrative proceedings this combination of roles has led to procedures little short of scandalous. It was shown that a trial examiner of one board, during a hearing, held an all day conference with the trial attorney, the regional attorney of the board, and the regional director.[34] That is as if a trial judge were to hold such a conference with the prosecuting attorney, the director of prosecutions, and the attorney general—of course in the absence of the respondent. There is much significance in the answer of an official of one of the important agencies as to whether the prosecuting officials of the agency could be kept from collaborating with the deciding officials. He said: "We try. But there is no way that we have been able to find to keep the prosecutors and the deciding officers from meeting at lunch and elsewhere and discussing their cases."[35] Many administrative agencies do not even try. Some actively provide for such collaboration in their established procedure. In a court house, where judge and prosecutor are not part of a common organization with a common head interested in promoting the prosecution, they would not be tolerated in talking over at lunch cases then on trial. In their case there is no common interest in carrying out the views of an organization of which each is part. Yet the ethics of the profession preclude any contact. Administrative law has developed no code of ethics to deal with an infinitely more dangerous situation in that prosecutor, advocate, and judge are part of one thoroughly organized bureau with intimate daily contacts and a strong common interest in the prosecutions carried on by that bureau.

Organization *Esprit de Corps*

I have spoken of this situation as a very serious one, and I submit it is much more serious than the majority of the committee and certain writers on administrative law are willing to acknowledge. In the testimony of the Attorney General (when Solicitor General) before the Senate sub-committee he seems to intimate that Congress intended one of the agencies to be unfair.[36] The report of the committee[37] is inclined to make light of the effect of organization and *esprit de corps* and supervision by a common head on which the responsibility for the result ultimately rests. But common sense and actual experience and the testimony of cases which have come into court and of investigations speak to the contrary. In an administrative agency there must inevitably be close contacts between the heads and the subordinates and of the subordinates of every degree with each other. But this necessity does not mean that

29. Monographs, pt. 3, p. 29. But what was to be gained? Greater latitude for finding the facts from the policy instead of applying the policy to the facts?

30. Report, pp. 207-210.

31. *E.g. Matter of Joyce* v. *Morgan*, 259 App. Div. 630, 635 (1940).

32. Monographs, pt. 1, p.. 16. Trial attorney and examiner share one office after the hearing.

33. Pt. 3, pp. 22-23.

34. House Rep. No. 3109, 76th Congr. 3d Session, pt. 1, p. 138. Combination of the role of prosecutor and of trial judge by the trial examiner was remarked by the court in *National Labor Relations Board* v. *Washington Dehydrated Foods Co.* (C.C.A. 9th Circuit, April 9, 1941). In another case the trial examiner "was a partisan anxious for the success and actively aiding in the development of the board's case." Stephens, J., in *Bethlehem Steel Co.* v. *National Labor Relations Board* (C.A., D.C., May 12, 1941). Arbitrary action of the trial examiner was shown also in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938).

35. Senate Sub-committee Hearing, p. 1312.

36. Id. p. 1433.

37. P. 57.

we are to give up attempt to secure impartial, objective determinations of fact nor that the importance of securing such determinations is negligible.

Inequality between Government and Citizen

Lord Herschell said truly that "important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it."[38] The British Committee points out the danger of permitting the Minister (i.e. head of an administrative agency) "to perform the incongruous task of dealing with the judicial part of the quasi judicial decision as an impartial judge when *ex hypothesi* he and his department want the decision to be one way rather than the other."[39] Moreover, the one-sidedness of administrative justice, a closely connected phenomenon, is brought out in many places in the Monographs and report. The situation as to issuance of subpoenas is notably unfair. Some agencies are without power to issue them. In some the requirements imposed on private parties are found to be "accidental, haphazard, and burdensome."[40] Private parties are required to disclose their evidence in requesting subpoenas and this information is submitted to counsel for the government, while a respondent has no access to the evidence of the prosecution. The Post Office Department, we are told, objects to statutory treatment of the power of subpoena because it will lead to claims of denial of right to subpoenas and will result in more being issued. What this comes to is that the power to issue subpoenas should be kept as secret as possible so that, while the agency may exercise the power in the interest of the prosecution, private parties may not readily do so. There is no idea of fairness as between citizen and government. It is the idea of the administrative tribunals of the Stuarts. The interests of private parties are negligible in comparison with the zeal of the administrative agency to get results. One of the chief ideas of the minority is to create and maintain equality of opportunity between the government and the individual in matters of procedure.

Delegation to Subordinates

A seventh characteristic of administrative justice is a tendency to delegate decision to subordinates where the law requires decision to be made by the head, and to make decision by the responsible authority a perfunctory matter. This is something that was forbidden in judicial justice long ago. The Roman law had to forbid the delegates of the emperor, appointed to hear appeals, from delegating their task. In the canon law the Pope had to forbid redelegation by those whom he chose to hear appeals to Rome. There is no such thing known to our law as delegation to a subordinate of a judge's duty of decision. The extent to which determinations are those of subordinates and not of the responsible administrative heads in whose name orders are made has been brought out in many recent discussions. The head of one of the most important of federal administrative agencies said about a year ago: "The Board members themselves cannot expect to read the records. In making its decisions the board, therefore, avails itself of assistants. . . . The review attorneys analyze the evidence, inform the board of the contentions of all the parties and the testimony relating thereto, and, after decision by the board, make initial drafts of the board's findings and order."[41] As a witness before the Senate sub-committee said, "There are many youngsters who are given pretty broad arbitrary powers in dealing with pretty important matters."[42] It is significant that administrative agencies object to judicial inquiry into how determinations are arrived at. They seem to feel that if the external appearance of due process and decision by the authority appointed by law to decide can be created, nothing further should be looked for. The head of a very important board said to a bar association a year or so ago that if there was a complaint defining the issues, an intermediate report redefining the issues after hearing, and opportunity for oral argument before the agency itself, "the requirements of fair hearing do not permit an inquiry into the internal operations of the administrative agency, at least in the absence of specific allegations of fraud."[43] In other words, such things as secret reports, conferences with one side in the absence of the other, dictation of the examiner's report by the prosecuting official, decision on abstracts of the record not accessible to the parties, and review by conference with the subordinates reviewed, are not to be inquired into.

Ignoring Requirements of Fairness

It is fundamental that one who decides controversies and exercises what are substantially judicial functions should know the record thoroughly. If he is to decide on the basis of an abstract, it should be, as in the courts, one agreed on by the parties or settled after hearing both as to what it should contain—an abstract settled before argument and available to the parties at the argument so that those who argue and those who decide have the same material before them. He should not decide on an abstract made after argument by a subordinate, very likely in conference with the prosecuting advocate. The general attitude of too many administrative agencies, however, is illustrated by the objection of the National Labor Relations Board to a provision recommended by the minority intended to emphasize the responsibility of the individual officer. Many cannot afford the expense of formal hearings and judicial review. Their only reliance is the fairness of a multitude of subordinate officials. There is obvious need, therefore, to emphasize that they have a responsibility beyond that of carrying out in every

38. 2 Atlay, Victorian Chancellors, 460.
39. Rep. of Committee on Ministers' Powers, p. 79.
40. Report of Committee on Administrative Procedure, pp. 124-125.
41. 51 Rep. Va. State Bar Assn. 414-415 (1939).
42. Hearing before Senate Sub-committee, p. 1294.
43. 51 Rep. Va. State Bar Assn. 427 (1939).

way the general aims of the organization. They should be made to feel that they are under responsibility as lawyers are under the canons of ethics and judges under the canons of judicial ethics. That an authoritative statement of this responsibility should be objected to as "dangerous," can only mean that the agency so objecting seeks to ignore requirements of fairness toward those whom it is pursuing.

Characteristics Are Deep-Seated

That these tendencies of administrative determination are not a matter of occasional sporadic cases but represent inherent and deep-seated characteristics of lay administration of justice is shown by the number of cases found in the reports of all jurisdictions and the persistence with which the same procedures appear for years after the courts have called attention to them. Four such cases are to be found in the one volume, 259 App. Div. (N.Y.) covering from March to August, 1940. Such things explain the activity of lawyers, who have continual experience of what these tendencies in action mean to their clients, in seeking effective safeguards as to records, hearings, and findings, an understood and fair procedure, and a modern mode of appeal from administrative orders.

Checks upon Courts

It is of special importance to take account of the checks upon courts which do not obtain or in our practice are ineffective as to administrative agencies. Four of these checks are significant. In the first place, in a court the judges from their very training are impelled to conform their action to certain known standards and to conform to settled ideals of judicial conduct. Professional habit and training lead them to hear both sides of every point scrupulously, rules of law which have entered into their everyday habits of action lead them to insist that everything upon which they are to base an order or judgment must be before them in such a way that no party to be affected can be cut off from full opportunity to explain or refute it or challenge its application to his case. Judges in court are impelled in every case to seek authoritative grounds of decision before acting and to base their action upon reasoning from such grounds. Again, the decision of a court is subject to criticism by a trained profession to whose opinion the judges, as members of the profession are keenly sensitive. Thirdly, every decision and the case on which it was based appear in full in public records. In those records any one may find exactly what the claims of the respective parties were, what disputed questions of fact and law were before the tribunal, and how the questions of fact were determined—If by a jury very likely by questions put by the court and specifically answered, if by a judge, in the form of special findings of fact. Likewise any one can find from those records what conclusions the court came to as to the applicable law, either in the form of instructions to the jury or of findings by the court. Moreover, the judgment of the court must respond to the pleadings, findings of fact and conclusions of law, and any lack of consistency in these respects will be apparent on the face of the record. Fourthly, every judgment of a single judge is subject to review by a bench of judges, independent of the one whose action is to be scrutinized and constrained by no hierarchical organization or *esprit de corps* to uphold whatever he does. Nor is this all. In the case of appellate courts all important decisions and the grounds on which they proceed and the reasons on which they proceed are published in the law reports. The opinions must be based upon the records in the cases decided, and those records are public records accessible to every one. Thus the materials for criticism of and accurate judgment with respect to judicial decisions are always available and readily accessible. There are no such checks upon administrative action.

Want of Checks on Administrative Justice

Let us make a comparison. Those who sit in administrative determinations seldom have had experience of the deciding function. The expertness demanded of them is of quite another sort. They are likely to have the layman's idea that decision is an easy task involving no acquired expertness through training and experience and to be conscientiously unconscious of what the lawyer soon learns, namely, that there are two sides to every case. Without training in grounding their action upon certain known standards, they are prone to act in deciding, as very likely they properly may in directing, as if every case was unique. Again, the number of those who are competent to criticise administrative determinations, as distinguished from the general course of administrative action, if we leave lawyers out of account, is at least very limited. They are not necessarily members of a common profession with the administrative officials and the latter are not unlikely to consider their criticism and that of lawyers negligible. Thirdly, administrative determinations are not safeguarded by the detailed and explicit records which keep down any tendency of a court to act otherwise than impartially and objectively in arriving at its determinations and enable lawyer and layman alike to know accurately what has been done and how and why. Fourthly, as will be shown presently, review of administrative determinations by an administrative official is a very different thing from review of the action of a judge by an independent bench of judges.

Difference of Spirit of Administrative Justice

I do not claim for a moment that the technique of judicial proceedings is to be applied to administrative determinations. But it is just because it is not, and because the checks upon judicial action are necessarily wanting, that we are required to do what we may to provide reasonable checks and assurance against the tendencies which administrative justice displays. Indeed, the Monographs disclose this need. For example, one of them points out the

want of specific grounds of complaint in proceedings in the Department of Labor under the Walsh-Healey Act. There is only a general complaint. This is found objectionable in the Monograph, and it is noted that the Department urged unsatisfactory grounds for not making complaints giving real notice.[44] It should be noted also how a court of equity submits or requires submission of a draft decree in any important case to counsel for the defeated party for suggestions and objections. The spirit of such procedure is wholly different from that of administrative adjudication.

Need of Simple Appeal

If such things could be easily and effectively reached by judicial review, as provided at present, it would not so much matter. The term "judicial review" has been criticized as connoting a putting of the judiciary above the executive. But the name is a name not a description. Appeal is only a modern, speedy, non-technical, less expensive mode of adjudicating controversies arising upon administrative orders, substituted for the older writs at law or suits in equity. If the latter were permissible and unobjectionable the former are also. Statutes, however, often make no provision for review.[45] In that event, as appeal is a purely statutory proceeding, the only recourse is a suit in equity for an injunction, an expensive proceeding, calling for taking evidence *de novo* and involving risk of substituting the discretion of a court of equity for that of the administrative agency. Moreover, in statutory appeals it is held that the ordinary incidents of review by appellate courts do not apply to proceedings of administrative agencies.[46] In some cases it seems that mere injury to a private interest does not permit of the statutory appeal and leaves only the awkward remedy of a suit in equity.[47] Certainly the criterion of appealability ought to be whether the party seeking review has a substantial interest which is affected. This is what courts and statutes have come to in judicial proceedings, and it should be so as to any sort of proceeding. That statutes provide otherwise is but another example of the extent to which the interests of private persons have been coming to be ignored. Other difficulties in judicial review as it now exists are pointed out in the report of the committee,[48] We may take it as admitted that the present condition is unsatisfactory. It should be added, however, that one of the purposes of appointing the committee, suggested by the President, was to "avoid litigations." This should be achieved by a simple appeal replacing suits in equity; not by making appeal difficult or by cutting it off and leaving parties aggrieved to suits in equity or attacking orders as void when prosecuted for violation of them.

Effects of Official Zeal

In pointing out the characteristics of administrative justice as it has developed somewhat rapidly in the United States in the last fifty years, one is not in the least attacking the members, past or present of our administrative agencies, nor impugning their intentions or motives. What is behind those characteristics is largely zeal in carrying out laws which are felt by those chosen to administer them to be of paramount importance, justifying the means by the end. It is natural that an administrative agency should see its particular, relatively narrow task out of proportion. To take an example which is no longer controversial, this was notably manifest under the regime of national prohibition. Those in charge of administering the National Prohibition Act felt strongly, and no doubt conscientiously, that the objects of that Act were of such overruling importance as to justify extra-legal measures and overriding of individual rights and constitutional guarantees. Indeed, it has been argued by an able exponent of the administrative standpoint that we must look at administrative adjudication "against a background of what we now expect government to do." If we keep our eye too exclusively on that background we may overlook the importance of how we expect government to do it. The effect of well intentioned zeal upon administrative justice has often been remarked. Thus the British Commission said: "Bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."[49] As a witness before the Senate sub-committee put it, "administrators have a tendency to become so wrapped up in their objectives that they are often unnecessarily disregardful of private rights."[50] The Attorney General, when Solicitor General, testifying before the Senate sub-committee put this as an excuse for not effectively segregating the judging from the prosecuting function, saying that administrative boards were set up to carry out policies and make that the paramount consideration.[51] The attitude is praiseworthy and has its good side as making for efficiency. But because it makes for efficiency at the expense of individual and guaranteed rights is the best of reasons for imposing checks and providing adequate judicial review.

Administrative Rule-Making

Thus far I have spoken of administrative adjudication. Hardly less important is administrative rule-making. Here, again, the significant point is the extent to which exercise of the powers of administrative agencies is left at large as compared with exercise of the powers of legislatures and courts. Administrative rules and regulations having the force of laws have become an increasingly important part of the everyday law in nation and state. Often these rules affect interests of far more economic significance to individuals than statutes or rules of court. Yet even the least significant statute must be for-

44. Pt. 1, pp. 8-10.
45. E.g. in case of fraud orders. Monographs, pt. 12, pp. 17, 25.
46. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, U.S.C.A.D.C., February 3, 1941.
47. Ibid.
48. Report of Committee on Administrative Procedure, 210-211.
49. Report of the British Commission on Ministers' Powers, 78.
50. Hearings before Senate Sub-committee, p. 1295.
51. Id. p. 1435.

mally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each house, discussed in committee of the whole, passed by each house, and approved by the executive. Rules of court are drafted by committees of judges, practising lawyers, and law teachers, or by judicial councils, referred for criticism to bar association committees or committees of the bar in different circuits, discussed before bar associations and in the legal periodicals, and only adopted after every one having an interest has been fully heard. Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is sought to be enforced against them and they may attack it in the courts. As was said by a witness before the Senate sub-committee: "The members of the Bureau of Customs are not business men. They will issue regulations without consulting business men, and the result is business is upset."[52] Another witness points out that administrative rules and regulations may require over night a change in long standing business practice without any one affected having an opportunity to be heard in advance.[53] Still another witness says: "I have seen regulations changed by the Department where there was no opportunity whatever to be notified in advance to discuss the matter and where great difficulty and expense were involved, and where later tremendous effort to get a hearing and review came to nothing because there was no procedure."[54] How those affected feel about this condition is well put by the chairman of a committee of the National Association of Manufacturers: "When administrative rules or regulations are necessary to clarify or enforce the law, any person to be affected should have a real opportunity to be heard and participate in making rules which will govern his future conduct."[55] One would think this an eminently reasonable proposition. But it is strenuously objected to by important administrative agencies.

Difference of Attitude of Majority and Minority

I have gone somewhat fully into the conditions calling for legislative action because it is only by seeing what they are and measuring their seriousness that we may judge between the majority of the committee, which would do little more than make an appearance of progress, and the minority, which would make a serious legislative attempt to relieve against the manifest grievances of those whose interests are affected by administrative adjudication and administrative rule-making. For at bottom the difference between the two is upon fundamentals. It proceeds upon different conceptions of law and government with respect to the crucial problems of administrative procedure. Both agree, for example, that a separation of the functions of initiating complaints, investigation, prosecution, and advocacy of the prosecution, from the function of adjudication is highly desirable. The majority, however, conceive of efficiency of the administrative agencies toward their objects of such paramount importance that they would risk great unfairness to individuals to give full effect to this importance. Hence they would achieve the separation, so far as it may be done, within the agency itself. The minority conceive that fair treatment of individuals and securing of individual rights is at least of equal importance with administrative efficiency and that effective separation within the agencies being impossible, it must be secured from without. This gets down at once to the separation of powers which has been fundamental in our American polity since the first constitutions were set up on the morrow of the Declaration of Independence. It is significant that the exponents of the administrative point of view treat our constitutional organization very cavalierly, as something not to be treated "in the light of numerology" as if there were magic in the number three. It was not, however, because of any regard for the number three. The objection is that concentration of unchecked power brings back the type of government that our constitutions were set up to avoid.

Minority Not Hostile to Administration

It is true the Attorney General does not go so far as the extreme advocates of the administrative point of view. In his evidence before the Senate sub-committee he disclaims any view that administrative agencies should be left without check. But he holds that, on the whole, they are sufficiently checked as things are, in view of the importance of their objectives. In like manner the minority disclaim any hostility to administration, which every one must recognize is necessary on a large scale today, and any desire to interfere with efficient attainment of the objects of administration. But these objects are not the sole end of government. The balance between efficient operation of these agencies and the securing of individual rights is quite as important as the aims of the agencies, unless we assume, as do some of the proponents of administstrative absolutism, that rights are an obsolete archaism and that individual rights are negligible in this connection. That some of the authors of the Monographs would accede to the idea of a "fourth department, with full undifferentiated legislative, executive, and judicial power" is suggested by the argument in one of them for administrative imposition and enforcement of penalties.[56]

In general, then, the majority minimize the characteristics of administrative justice and their effect upon individual rights.[57] The minority, on the other hand, consider it not enough to note a number of confessedly bad conditions, admit they should be corrected and recommend further study or that the agencies

52. Id. p. 1191.
53. Id. p. 1235.
54. Id. p. 1420.
55. Id. p. 1217. See also id. 1239.
56. Pt. 10, p. 28.
57. See, e.g., the apology for one-sided investigations in Pt. 8, pp. 11 ff.

themselves make the corrections. The minority consider those characteristics too deep-seated to correct themselves and so urge that legislation should do more than set up an agency to receive complaints and make suggestions.

Comparison of the Two Programs

This is brought out when we compare the two programs. The minority is so called because, concurring in the general report as to the conditions calling for legislation, they express additional views as to what should be done and make additional recommendations for lawmaking. The differences are, then, as to how to meet admitted defects in the present situation. The majority would only: (1) create an Office of Administrative Procedure to make further studies; (2) recognize a limited participation of private parties to be affected in rule-making or amendment of rules, but not requiring it; (3) establish a new system of appointment and functions of hearing officers, but without requiring adherence to it; and (4) confer on administrative agencies authority to make declaratory interpretations in their discretion. The majority agrees that there ought to be further guides to administrative justice, but considers that the Report of the Committee on Administrative Procedure of itself will serve as a guide. The minority considers that the Report cannot, of itself as a mere statement of bad conditions in particular agencies, meet the tendencies of all administrative agencies, if operating unchecked, of which there are so many illustrations even in the Monographs in which the best case possible is always made for the administrative agency. As to the four proposals of the majority, the minority urges that, particularly when imperfectly carried out, they are less than half measures.

Minority Proposals

Accordingly, the minority make three additional main proposals: (1) A complete separation of the judicial function upon the model of the Board of Tax Appeals; (2) statutory clarifying of the present minimum rule of judicial review so as to prevent further whittling away of review; (3) standards of fair procedure.[58] Not a detailed code of rules of procedure, but a statement of legislative policy and a set of principles, i.e. authoritative starting points, to be compared with the settled principles of exercising the chancellor's discretion in equity.

This difference between disinclination to take hold of problems and do something about them, on the one hand, and, on the other hand, recognition of them as serious matters demanding action and attempting to do something about them, runs through the two Reports. For example, some administrative agencies do not want to make public their internal organization. Some object to publishing their general instructions to their agents. Some object to making public any information as to the way in which they conduct their work. As is said in the Report, "laymen and lawyers alike accustomed to the traditional processes of legislation and adjudication, are baffled by a lack of published information to which they can turn when confronted with an administrative problem."[59] Majority and minority agree that here is a bad condition. The majority, in effect, stop there. The minority seek definite remedy.

Proposals as to Procedure

Again, compare the treatment of procedure. For example, the report is that notice in administrative proceedings is frequently inadequate. But, having found this defect, the majority propose to do nothing about it. The minority, on the other hand, propose that the statute require notice to be given with sufficient particularity to apprise the parties of the issues and not to include charges or implied charges phrased generally. The Report shows and the testimony before the Senate subcommittee brings out a condition of irregularity and unfairness as to issuance of subpoenas. A witness tells us that legislative provisions as to subpoenas and a standard procedure "would be very helpful."[60] But it is only the minority which is seeking to bring about equality here between government and individual and procedure securing the claim for subpoenas against abuse. Or the treatment of rule-making. The Report sets forth that its recommendations as to rule-making procedure are intended to improve the rule-making process by emphasizing the importance of outside participation in the issuance of rules.[61] But the measure proposed by the majority does not cover the matter at all. The minority, however, seeks to deal with it by legislative prescribing of general principles or guides. The minority are not willing to leave one of the most important features of administrative justice untouched.[62] But objection is made to the minority proposal because in adapting the declaratory judgment procedure to parties contending for the invalidity of a rule or seeking interpretation of a rule, the court, it is provided, is to pass upon the "propriety" of interpretative rules, i.e. is to decide whether they properly interpret the statute. It would not be easy to find a better example of the theory of putting administrative agencies wholly at large. The interpretation of the statute and whether the administrative interpretative rule conforms to a proper interpretation of the statute, under our polity are certainly questions of law for a court.

Majority Propose Half Measures

Again, compare the treatment of investigations and inspections. These pre-complaint investigations are likely to involve very serious consequences to individual business. We are told that the great majority of administrative orders are made "informally by mutual consent." But it appears that that consent has often been extorted by threat of an investigation and the publicity given it which may be disastrous to a busi-

58. See Report of Committee on Administrative Procedure, 214-216.
59. Id. beginning of chap. II.
60. Hearing before Senate Sub-committee, p. 1442.
61. Report of Committee on Administrative Procedure, 6, 103-110.
62. Id. 35.

ness.[63] There is a mass of testimony on this point which discloses grave possibilities of abuse. The majority recommend it for further study. The minority ask for legislation imposing some check.[64]

Or, turn to the subject of judicial review. The majority devote themselves to procedure within the administrative agency. But important as that is, we must not overlook the characteristics of administrative action which call for effective judicial scrutiny to preserve the rights of individuals. No matter how perfect the procedural machinery prescribed for administrative officials, these characteristics call for and our polity requires access to the courts by aggrieved individuals complaining of arbitrary or one-sided or extra-legal operation of that machinery. Hence the Report needs supplementing by adequate provisions as to judicial review, and the minority seek to add them.

So, too, as to the combination of prosecution and adjudication. The hearing-commissioner system is the central point of the majority recommendation. But, as will be seen presently, it is so limited and qualified in the proposed statute as to its application as to deprive it of substantial efficacy. The minority make no such halting proposal.

Standards of Fair Procedure

But let us look more in detail at what the minority deem the deficiencies in the proposals of the majority. The need of legislative statement of standards of fair procedure is set forth at length and convincingly in the Report of the committee.[65] Such a statement is needed above all because there is no traditional technique and there are no received standards of hearing known to or understood by the laity. But doing anything to meet this admitted need is evaded by a supposed dilemma. Prescribing of rules for administrative procedure and administrative rule-making is objected to on the ground that rules are too rigid. The alternative of a statutory statement of standards, carried into execution by the minority, is objected to because, as it is said, the statements are only hortatory—they are not definite enough. But this is as if the Attorney General were to object to the old "stop, look, and listen" rule as too rigid and then object to referring a crossing accident to the general standard of negligence on the ground that to tell people to use due care under the circumstances is only hortatory – is not definite enough. The net result is to leave things as they are after an elaborate Report that they ought to be remedied. So, also, as to delegation of the power of decision. The minority urge that delegation of authority, admitted to be necessary, is to be subject to a fundamental limitation that delegations and review procedures consequent thereon shall be specifically provided for and given notice of in the agencies' published rules so that persons interested may know how to proceed, and to a further limitation that where a superior is to review or revise the action of a subordinate, the party to be affected is to be heard before him the same as before the subordinate. This last proposed limitation meets a very serious defect in some procedures in that those affected have no hearing before the authority which really decides against them. No doubt there are some difficulties in applying this proposition to some agencies. But there is a serious point here that ought to be covered in some effective way. Where one is not heard before the ultimate deciding agency, he may not have had a chance to meet what has been decisive against him although he could have done so had he known what it was and been permitted. Where power to decide cases is delegated adequate safeguards are particularly needed. The majority proposal allows delegation to an individual member of the agency and provides that the safeguards prescribed for other cases shall not apply. The minority at least try to deal adequately with such cases by providing standards for the conduct of the hearing and the receiving of evidence. Really there ought to be a minimum for a final determination in cases of any importance. It is only in this way that individual prejudices and idiosyncrasies may be deprived of effect. Courts of review always have a minimum bench of three. One-man review is not review.

Rule-Making Procedure

It ought not to be insuperably difficult for an administrative agency to see to it that all interests involved are to be given opportunity to be heard where rules affecting them are to be adopted. A notice that rules on a given subject or point are in contemplation is not a hard requirement. What was done when the Supreme Court of the United States adopted rules of procedure for the federal courts, or when the Supreme Court of Texas adopted rules of procedure for the courts of that state, shows what can be done when a full set of rules or a complete revision is intended. In case of single rules, notice reasonably calculated to reach those likely to be affected would seem a minimum of fairness. But the majority proposals make no requirement of participation of persons to be affected. The minority seek to deal with this most important subject and, in my judgment, might well have gone further than they did. Certainly it is not enough to require interpretative regulations to be published, which is all that the majority proposes. The minority makes at least a minimum provision for method in the making of these rules. In his testimony before the Senate sub-committee the Attorney General says rule-making is to be done by the authority sitting around the table and calling in the experts.[66] But it is not unlikely that the experts represent only one side of the matter. Persons who may be vitally affected are likely not to be repre-

63. Hearing before Senate Sub-committee, 1221-1227; S.E.C. Monograph, 52-54; Monograph of Attorney General's Committee, pt. 11, p. 15, note 24; Report of Committee on Administrative Procedure, 134-135; Report of Special Committee to Investigate the National Labor Relations Board, 52, 110-111.

64. S. 674, § 106.

65. Report of the Committee on Administrative Procedure, 214-216.

66. Senate Sub-committee Hearing, p. 1430.

sented by the official experts.

Declaratory Judgments and Rule-Making

As to applying the declaratory judgment procedure to newly made administrative rules, the old objection to all declaratory judgments is raised, namely, that the procedure is "against the spirit of our common law and should not be tolerated."[67] This is a strange objection from one who looks lightly at the methods of adjudication in administrative agencies, which are notoriously contrary to that spirit. But the objections to declaratory judgment procedure were thrashed out long ago and such an objection is belated. It is added, however, in opposition to the proposals of the minority that it is dangerous to allow courts to pass on the reasonableness of an administrative rule.[68] This amounts to saying that it is dangerous to require due process of law. No other agency of government is allowed to act arbitrarily and unreasonably. Why, then, an administrative agency? It is said that the proposal would substitute a judicial for an administrative judgment "as to the wisdom and necessity of the rule."[69] As to this it is enough to say that the line between arbitrariness and unreasonableness, on the one hand, and wisdom, on the other, is now perfectly well understood by the courts. The objection amounts to a proposition that due process of law is to be an administrative question. It is said, however, that in case of a rule which invades some legal right or legally protected interest of the citizen he may be able, *if threatened injury is clear and specific enough,* to go to court and get a review under the general Declaratory Judgment Act. Note, however, how this suggestion is qualified. The rule may be an unreasonable one that ought not to be enforced against him and its mere existence as potentially enforceable may seriously embarrass his business or enterprise. But that is not enough. He must be hung up, as a business cannot afford to be, till a specific injury is actually threatened. It is exactly this of which business men complain. The mischief to business must be done before the rule can be attacked. Hence the minority goes much beyond the majority in providing for judicial review of rule-making by the only modern and satisfactory method, namely, the declaratory judgment. Anything short of that—waiting to be prosecuted, suit for an injunction—is under the conditions of today a denial of review to the great majority of those affected. Only in causes of exceptional magnitude, affecting enterprises with well-equipped legal departments, are those remedies practically available. Nor do the objections made to legislative regulation of rule-making stop there. We are told that a requirement of making rules showing what an administrative agency actually does, but does not inform us that it does, is objectionable because it makes rigid what should be flexible and experimental. But all legislation has a quality of rigidity, and the argument amounts to saying that all legislation—and administrative rule-making is legislation—is dangerous. Rule-making to apprise the public of what is done and how it is done is not like making rules of conduct. Moreover, rules of conduct, so long as they are enforced by an administrative agency, ought to be knowable by the public. Also settled policies, which determine the action of the agency in deciding, ought to be knowable by those affected. It is perfectly possible to formulate and promulgate these things. If a tithe of the industry and ingenuity expended in raising objections to reasonably safeguarding the interests of private individuals had been expended in finding means of achieving some safeguards, the recommendations of the minority would not have been necessary.

Segregation of Prosecuting Functions

Much the same story is to be told as to the matter of separating the prosecuting function from adjudication. "Segregation of prosecuting functions" is unanimously set forth in the Report as something highly desirable.[70] But the majority is reluctant to deal with the matter squarely. Many agencies wish to consult with their experts after the hearing is closed. They wish to have specialists and experts advise them in private. Thus the parties have no means of refuting or pointing out errors or arguing as to mere opinions. The result is that they have had only a partial hearing. To segregate the prosecuting officers but not these experts is a half measure. It sanctions the practice of hearing the agency experts in private and thus providing only an unfair hearing. The minority would make effective provision for this. It will not do for administrative agencies to say that it is not practicable for these opinions and expert statements to be made in the open at the hearing subject to cross-examination or else communicated to the private parties concerned with opportunity to meet them by briefs or oral argument. More than this, however, the majority would achieve what is styled insulation only within the agency by segregation of the prosecuting officer from those who decide. The minority call in addition for adequate judicial review and standards of fair conduct for the guidance of those engaged in the respective functions involved in administrative adjudication. The objection made to effective separation of adjudication is that it divides responsibility, creates danger of friction between complementary agencies and so breaks down responsibility. But what is the danger of friction except that the adjudicating agency may on evidence find the facts differently from the pre-conceived idea of the directing officers reached on supposed grounds of policy. As to breaking down responsibility, there is also a responsibility for right determinations of fact and for fairness which is no less great than that for successful prosecution of all instituted proceedings. The argument as to responsibility is the familiar one for absolute government. It adopts the military analogy. There

67. Testimony of the Attorney General, ibid.
68. Id. pp. 1431, 1448-1449.
69. Id. 1448.
70. Report of the Committee on Administrative Procedure, 43 ff.

is to be one head with full responsibility and power commensurate with the responsibility. As to the standards proposed by the minority, it is enough to say that the judiciary have never objected to the canons of judicial ethics. The minority would establish canons of quasi judicial ethics for administrative agencies where the need is even greater. In the Report of the committee it is said that if decisions are made by the staff of the agency, reducing the officer presiding at the hearing to a mere figure head, "the conduct of the hearing becomes divorced from responsibility for decision" (i.e. upon the issues at the hearing), "the hearing degenerates, and the decision becomes anonymous."[71] Yet this is the effect of the proposals made by the Attorney General as to majority measures in his testimony before the Senate sub-committee.[72] As to the hearing-commissioner system it is so limited in application that things are likely to go on much as they are. We are told that the minority measure would make radical changes in the procedure of many agencies and that is regarded as objectionable. But, says the Attorney General, administrative boards are set up to carry out policies and make that the paramount consideration.[73]

Judicial Review

Again, the majority make no recommendations as to change in the present standards (whatever they may be) of judicial review. They consider that, as dissatisfaction becomes manifest, there should be specific legislation to make specific changes.[74] The minority believe that there is at the present time dissatisfaction and that general provisions are required. Accordingly, they recommend that the reviewing court shall, regardless of the form of review proceeding, consider and decide, so far as necessary to decision and where raised by the parties, all questions of (1) constitutional rights and immunities, (2) the authority or jurisdiction of the administrative agency, (3) the lawfulness and adequacy of the procedure followed, (4) findings, inferences and conclusions of fact as to whether they are not supported upon the whole record by substantial evidence, and (5) administrative action otherwise arbitrary or capricious. A proviso is added that in such review due weight shall be accorded to the experience, technical competence, specialized knowledge and legislative policy of the agency involved as well as the discretionary authority conferred upon it.[75] This seeks to do away with the procedural and technical limitations upon relief to be had in the different proceedings for review and to provide a uniform standard for review of findings. The importance of more definite guidance of courts as to review of findings of fact needs no argument. We have had a like situation in the diversity of standards in appellate courts as to findings of fact in judicial proceedings. The subject was long made difficult by the rules which had grown up on writs of error, the common-law requirement of a verdict as the basis of judgment, and constitutional guarantees of jury trial and provisions as to review of verdicts. The federal rules now make clear provisions as to findings in trials to court without a jury, and the experience behind those rules ought to afford a sufficient basis for lawmaking as to findings of fact generally.

Review of Findings of Fact

As Dean Stason has well put it, "the law at the present time with respect to judicial review of fact issues can scarcely be called law at all. It consists of a chaos of conflicting theories, inconsistent statutory provisions, irreconcilable judicial decisions, and unconscionable uncertainty."[76] Some statutes provide for plenary review of the facts. Some make the administrative findings prima facie correct. In respect of some agencies the statute allows a decision to be set aside if "unsupported by the weight of the evidence." In some, review of findings of fact is narrowed to the utmost. In some the findings are required to be upheld "if supported by substantial evidence." But the term substantial evidence is not uniformly interpreted. At one extreme the reasonableness of inferences from a scintilla of evidence will not be reviewed. At the other extreme, there is a weighing of the evidence as on an appeal in equity. There are all gradations between these extremes. The minority seek to clarify the "substantial evidence" rule, which appears in no less than nineteen statutes. The majority proposal, as said by the Attorney General, "is silent on judicial review." He argues that Congress in the past has made "a purposive selection of alternative methods and scope of review."[77] But the statutes clearly reveal want of purpose. The methods of review have been provided for on no rational plan, as they happened to suggest themselves at the time particular acts were drawn. In the earlier statutes generally there was a desire to provide for judicial review. In later statutes sometimes there was eagerness to prevent review so far as constitutionally possible. The zeal of administrative agencies framing and pushing such measures accounts for much of that sort in the later statutes. But those who drew many of the statutes palpably never thought about the matter. It cannot be that this condition is what it ought to be in a subject of such importance. The things that call most emphatically for effective review are common to all administrative agencies.

Review by the Agency Itself

As one looks at the subject of review of decisions within the agency, the difference of attitude between the majority and the minority is once more apparent. The Report of the committee brings out abundantly how perfunctory this is apt to be. In one case we are told that the reviewing authority looks at part of the record in about fifty per cent. of the cases. In the other half he does not even look at a part. He never

71. Id. 45.
72. Senate Sub-committee Hearing, pp. 1435-1437, 1417-1418, 1483-1484.
73. Id. p. 1433. That attitude had much to do with the breakdown of prohibition administration.
74. Report of the Committee on Administrative Procedure, 29.
75. S. 674, § 311e.
76. Senate Sub-committee Hearing, p. 1353.
77. Id. p. 1452.

reads the record as a whole.[78] This is defended on the ground that the case has been gone over so thoroughly before it comes to the reviewing authority that little attention on his part is needed.[79] What this means is that from the start attention has been directed to sustaining the determination appealed from, so that it might as well stop with those who made the determination reviewing their own action. In the Morgan case Chief Justice Hughes had much to say about this conception of the duty of a responsible authority.[80] Criticism of that case by advocates of administrative freedom from checks overlooks that the statute required the action of the official who did not act as required. Much of the procedure by review within the agency suggests Punch's cartoon of Lord Darling charging a jury: "Gentlemen of the Jury, the man stole the watch—consider your verdict."[81]

Majority Calls for Further Study

What are the arguments against legislation doing something effective to meet the conditions shown by the Report and much else well known but not within the scope of a Report proceeding upon what the agencies say for themselves? As to many of the most important subjects, the conclusion is to await further study. But this matter has been studied for years, has been reported on by bar association committees, has been discussed at law institutes, was argued at length before committees in Congress in connection with the Walter-Logan bill, has been the subject of published lectures by professors of administrative law, and now is presented in a series of Monographs and a Report thereon. The result suggests Sergeant Brown's reconnoissance. He was sent up the Tennessee river with a section of artillery to throw a few shells into a position across the river in order to see whether it had been evacuated. Accordingly, he unlimbered his guns opposite the position, fired them off, promptly limbered up and hurriedly returned. In his written report he stated that he had gone to the spot, unlimbered his guns, fired, limbered up and returned and that he begged to report the result, "nothing in particular."

Supposed Checks

It has been argued in some of the books that there are already checks upon administrative adjudication.[82] But what are called checks are not at all safeguards of the rights of private individuals, but rather assurances of zeal to further the policies or assumed policies to be promoted. Others, such as requirement of findings of fact and judicial review have been shown to be largely illusory as the statutes stand. Again, it is said that the administrative agencies should be left to work out improved procedures and the situation will work itself out. No lawyer doubts that the details of administrative procedure should develop out of experience just as the details of judicial procedure should. But there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding. Lawyers are not seeking to tie administrative agencies down by a mass of detail as so many courts were tied down by codes and statutes a generation ago. What they seek is to secure the basic requirements of just determination of facts and sound application of law.

The Office of Administrative Procedure

One of the principal recommendations, relied upon by the majority as a substitute for legislative dealing with bad situations, is the Office of Administrative Procedure, which is to continue and conduct further studies and to look into complaints and make recommendations. We are told that this will have a good effect in that the public should feel there is a place where they can go when they feel they are not treated fairly and "let off steam."[83] There is to be a rousing of public opinion by reports or recommendations of this office.[84] The very existence of this agency for receiving complaints and making recommendations is to operate as a "psychological check."[85] Although it will have no power to enforce its recommendations, we are told they will have a tremendous influence on the administrative agencies.[86] Yet in the next breath we are told that legislative enactment of standards will give no definite guidance. An institution in the nature of a Ministry of Justice is an excellent suggestion. But an office as part of the administrative machinery, looking at all things from the administrative standpoint, and set up to afford aggrieved individuals an opportunity of letting off steam, suggests Judge Grover's alternative of appeal, namely, to go down to the nearest tavern and damn the court.

Standards Not "Hortatory"

A principal argument against the legislation prescribing standards, recommended by the minority, is that the provisions are merely "hortatory"—that they are exhortations rather than definite rules. This objection comes strangely from those who object to subjecting administration to rules. But the law is full of standards such as due care, fair conduct of a fiduciary, reasonable time, reasonable rates, reasonable facilities. In a sense all standards are hortatory. They do not attach a definite detailed legal consequence to a definite detailed state of facts. They prescribe certain limits of conduct to be applied according to circumstances. In a sense also legal principles are hortatory. They do not prescribe anything definite. They are authoritative starting points for reasoning. There is no reason why standards should not be as effective for administrative agencies as they have proved to be for the courts. Principles of the exercise of discretion have not unduly hampered courts of equity. Indeed, it is probable that those courts could not have maintained their wide powers if it had not been that their exercise of them was tem-

78. Report of the Committee on Administrative Procedure, 18.
79. Ibid.
80. *Morgan* v. *United States*, 304 U. S. 1, 14-15, 17, 19-20 (1938).
81. See the procedure set forth in Monographs, pt. 7, p. 13 and 13 note, pt. 8, p. 11.
82. Landis, The Administrative Process, 98-101.
83. Senate Sub-committee Hearing, p. 1295.
84. Id. 1303.
85. Id. 1293.
86. Id. 1427.

pered by principles.

No Analogy to Codes

In contrast with the argument that the proposals of the minority are "hortatory," the measures advocated in the past by the American Bar Association and measures recommended by the minority are compared to the elaborate codes of procedure to which the lawyer of today justly objects. But it is not formulation but over-detailed formulation that is objectionable. Procedure has always been formulated in our system, either by rules of court or by statutes, or by both. The common law does not grow by treating each case as unique and making a rule for it *pro hac vice*, but by a technique of finding a principle for new cases, following past decisions, and formulating principles to be applied in analogous cases. Administrative law has no such technique and attempt to develop one would no doubt be resented by its votaries. As to developing the policy of a statute by rules, the statute defines the policy and fixes the general objectives. But often the matter is still very much at large. Certainly the administrative agency ought to approach cases with some lines of policy and those who are affected ought to know what they are. To formulate them, even if they have to be reformulated from time to time, gives those affected some guidance and is a check upon the agency. It is not as if administrative legislation was of the plenary type of legislative lawmaking—the agencies are not making nor asked to make a code. They are asked to make public their interpretations of statutory rules and the policies in applying statutory standards by which they govern their determinations. If they cannot, it may be because they do not have and do not attempt to have any clear interpretations or policies of application. If so, they should be constrained to have them. Or it may be that they have interpretations and policies of application but are unwilling to have them known and perhaps criticized. If so, they should be constrained to make them known. If after promulgation it is found there should be amendments and additions and corrections, the way is perfectly open.

The Argument from Variety

Nor is there any real point in the argument frequently made from the great variety of administrative agencies and of the subjects committed to them. There is no variety in the characteristics of administrative determination which call for the safeguard of judicial review. There is something to learn here from the history of review of judicial proceedings in the courts. In the beginning there was a tendency to have a distinct type of review for each type of judicial proceeding. There were resulting difficulties and complexities and technicalities which we have been eliminating for a generation. Now we are coming to a simple appeal for all cases calling for review. Administrative law has been going through a like development. We ought by this time to have learned that a simple uniform procedure for review may be adapted by rules of court to every sort of case.

Internal Separation of Functions Illusory

Finally, it is argued that a sufficient remedy is to be found in internal separation of functions. It is said that an administrative agency is not to be thought of as a "collective person"; that there are many persons and different persons can be delegated to do different parts of the whole task.[87] Initiation of complaints, prosecutions, advocacy, and determination are to be "insulated" by committing them to different persons in one common organization. But a common head is over all of them, and what they do as they go along will be likely to be conferred about with the head. He or an active deputy or chief subordinate will be likely to decide whether to initiate a complaint, whether to prosecute, whether to accept a determination of fact, and how to apply the law to the determination. Such supervision is inevitable and that and the *esprit de corps* of an organization make the proposed insulation, as a remedy, illusory.[88]

87. Report of Committee on Administrative Procedure, 56.

Theoretical Setting of Majority Report

While the Attorney General does not wish to have administrative agencies operate uncontrolled, so much cannot be said for the teachers and writers who are so eager in opposition to all effective legislation on this subject. The sympathies of the majority were on this side rather than on the side of reasonable securing of individual rights and reasonable equality and fairness as between government and individual. Even if quite unintended, the majority are moving in the line of administrative absolutism which is a phase of the rising absolutism throughout the world. Ideas of the disappearance of law, of a society in which there will be no law, or only one law, namely, that there are no laws but only administrative orders; doctrines that there are no such things as rights and that laws are only threats of exercise of state force, rules and principles being nothing but myth or superstition or pious wish; a teaching that separation of powers is an outmoded eighteenth-century fashion of thought, that the common-law doctrine of the supremacy of the law has been outgrown, and expounding of a public law which is to be a "subordinating law," subordinating the interests of the individual to those of the public official and allowing the latter to identify one side of a controversy with the public interest and so give it a greater value and ignore the other; and finally a theory that law is whatever is done officially and so whatever is done officially is law and beyond criticism by lawyers—such is the setting in which the proposals of the majority must be seen.

88. How illusory separation of functions within an administrative agency is, appears in more than one of the Monographs, and most strikingly in the agency the Attorney General cites by way of example (Senate Sub-committee Hearing p. 1449). That the National Labor Relations Board, as to which the evidence shows abundantly how all the subordinates worked together to present the case against the respondent to the three commissioners ultimately responsible upon a "water-tight record," should be referred to as showing a sufficient separation of the deciding function, speaks for itself.

THE LONG VIEW OF HEMISPHERIC SOLIDARITY*

THE ROLE OF LAW

By DR. ENRIQUE GIL

Vice-President of the Bar Association of Buenos Aires, Argentina;
Vice-President Inter-American Bar Association

THE totalitarian states, in advocating the coming of a new order, base their philosophy on a different conception of law from that which we have in America.

For us, as our colleague Walter F. Dodd, of Chicago, says, when discussing the decreasing importance of state lines, "Law is a body of rules for the government of human life," "derived from the *consensus* of equal individuals or sovereign states." The totalitarians deny this principle, which, for us, is fundamental. For, in the words of Bartholomew Landheer, "the totalitarians interpret law as the product of individual volition imposed upon the wills of other individuals without even the formal requirement, at least, of a fictitious consent."

Such an irresponsible theory, carried from the realm of civil relations to that of international relations, with utter disregard for international law as well as for the rights of the individual, and seeking to enslave nations as the totalitarian states have enslaved their own citizens, has brought the world to the present impasse.

The American nations, united in the fundamental conception of law as part of their common heritage, where an uncompromising love of freedom, national and individual, forms the permanent substratum of the "American conscience" (so well defined by the Chilean jurist Alejandro Alvarez), come to the fore in the present ideological struggle with the uncompromising challenge of either *we* or *they*.

Let us have faith that certain inherent principles of individual or collective morality are not to be superseded, but are only transitorily dimmed, as it were, in the present period of world transition. Let us have faith in our ultimate victory in this ideological struggle, recalling the words, full of wisdom, of Elihu Root at the Disarmament Conference at Washington in 1921: "The law had been broken by a sea power but was still the law; it was necessary that this should be brought before the public mind: the law was not a teacup or a pitcher which once broken was irretrievably ruined."

Summing up, it may be stated that the role of law in this Hemisphere is, and has been, with insignificant exceptions:

(a) to assure civil liberties to the individual as a human being;

(b) to insure national freedom;

(c) to maintain order in each commonwealth; and

(d) to guarantee reciprocal respect and cooperation among the American nations.

Of course, the skeptic or Philistine would claim that there has always been, and that there is, even at present, a great gulf between these postulates and their actual application both to the internal life of the American communities and to their relations to each other.

But I assert that noble thoughts and ideologies have functioned in America not as inanities, but as vital forces contributing to the advancement of our people, and that ideals of civic and communal welfare have not been screens for deception, although many such ideals have had to be sacrificed in order to promote the achievement of others.

Is it not a fact that the Supreme Courts of our countries have time and time again ruled that international law is a part of our own laws? Is it not a fact that most of our constitutional charters provide that Congress has the power to define and punish . . . offenses against the law of nations?

And now that I am referring to our political Constitutions, I hope that I may be permitted to exhume from the past, from my own country, excerpts from Provincial or State Constitutions drafted in the heroic period of civil struggle and poverty, a period so admirably and colorfully described by your Breckenridge in his book "A Voyage to South America Performed by Order of the American Government, 1817-1818."

Do you perceive, as I do, the living force represented by ideals, when I say that the Constitution of December 11, 1821, of the Province of Corrientes, section 8, on the subject of individual rights and security stated:

"Article 1st. Man as a person is the most *beautiful* thing in the world."

I have deliberately given the literal translation of the word "hermosa" which appears in the original Spanish text, as it truly represents, although quaintly expressed, the typical spiritual attitude of that time.

"Article 2nd. A man's life, honor, property, peace and security are placed under the immediate protection of the law."

Or in the Constitution of the Province of Catamarca, July 11, 1823, of which Article 17 reads as follows:

*Address before American Bar Association at annual meeting at Indianapolis, October 1, 1941.

"Any man is entitled to be worthily and honorably called 'a good man' if he is a good father, a good son, a good friend, and a good neighbor."

Or in the Constitution of the Province of Cordoba, February 9, 1847, by the first article of which man's right in society to life, honor, liberty, equality, property and security is fully recognized.

And now, when everybody seems to peddle "hemispheric solidarity," when Henry Clay's generous outburst in your Congress seems to have been eclipsed by the discovery that the American nations are neighbors, may I point out, for the sake of illustration, that "American solidarity" was born with the independence of the American nations and not from any present danger which may threaten us as the result of the possible collapse of Europe.

As early as 1819, 1822, and 1824, the Constitutions of the then poverty-stricken Argentine Provinces of Santa Fe, Corrientes and Entre Rios (farther away from the European centers of civilization than we are today from any planet) proudly proclaimed *urbi et orbi* that they considered as a citizen any man born in the Americas and that he was as such vested in their territories with all the privileges inhering in such citizenship.

Are we going to break with that past, are we going to forget that our forefathers built our respective nations inspired by those ideals, are we going to exchange them for the befuddled, hysterical reactions of peoples dominated by a collective suggestion of fear and inferiority?

Or are we going to stand and proudly affirm and fight for, if necessary, the principles under which the founders of our nations saw the light, and thus assure for our posterity the benefits of freedom and justice? Or are we to accept, instead, Nietzsche's dictum—fruit of European nihilism and debacle—which is at the bottom of all anti-Christian Hitlerian philosophy, that a good man is good because he is not strong enough to do evil?

Let us all be reunited under the inspiration of the generous principle of Article 7 on citizenship of the Constitution of the Province of Cordoba of 1847, declaring to be citizens of the Americas all men who can establish their allegiance and support of liberty and independence in our Hemisphere.

And this thought brings us to the essence of the problem we are discussing:

Let us not quibble as to whether or not our respective democracies are perfect, as to whether or not at times we have failed to adhere to principles fundamental and inherent in our nations as such, or as to whether or not individual rights have always been protected to their fullest extent; let us, instead, go to the bottom of the problem and affirm once for all that that which holds us together is something loftier, more transcendental, something that partakes of its telluric origin, and results from the colonization of a virgin-continent by two great human races, the Anglo-Saxon and the Latin.

We perceive, when envisaging the problem in that way, that the cause of American or continental solidarity is a great cause, one which we may almost call a holy cause.

As we should not take the name of the Lord in vain, we should not make continental solidarity a matter of mere novelty or fashion. If we do, we run the risk, by casual usage or by false invocation, that such a noble concept may sink into worse than discredit—into eternal oblivion.

The feeling of solidarity binding subconsciously the people of the Americas and the indisputable existence of an American collective conscience are spiritual factors which, although of an abstract nature, are not less effective and powerful instrumentalities.

People will not rally around any standard or effectively support any action, regardless of how urgent or grave the emergency may appear, unless they are raised from the mire of daily drudgery and struggle by a lofty spiritual, idealistic call.

It was thus that Woodrow Wilson's Fourteen Points, which, taken in their broader sense, were all American postulates, worked like a battering-ram in the last war. It makes no difference that afterwards Wilson's creed, by political sleight-of-hand in Europe, was mostly used as a screen for shortsighted and selfish policies, falsely designated as protecting supreme national interests. Those postulates stood, and will stand, the test of time, as we have seen recently proved by their reiteration in the Roosevelt-Churchill declaration of present war-aims. The reason is that they are principles inherent in the policies of the American nations, which have sponsored them continuously since Bolivar's conference at Panama as doctrines truly interpreting a world-wide tacit human aspiration.

As for the doubting Thomases, let us remind them that there is tangible evidence of progress in the task of fostering better relations among our countries. I shall deliberately not cite the material or commercial advantages already secured, but shall point to the elimination of two factors which have hindered a good and sincere understanding and closer cooperation in America.

I have in mind the phantom of the "Interventionist Policy" of the United States in what are called, for lack of a better name, the Latin-American countries, and the bogey of "annexation" with regard to Canada.

The first received its coup de grace at the 1936 Buenos Aires Inter-American Conference for Maintenance of Peace as a result of President Roosevelt's statements, the principles of solidarity and cooperation adopted there, and the subsequent declarations of Secretary of State Cordell Hull in Lima, 1938, Panama, 1939, and Havana, 1940.

Fully two years before the beginning of the present war, the American Republics agreed on the following:

1. That the American nations, true to their republican insti-

tutions, proclaim their absolute juridical liberty, their unrestricted respect for their several sovereignties and the existence of a common democracy throughout America.

2. That every act susceptible of disturbing the peace of America affects each and every one of them, and justifies the initiation of the procedure of consultation provided for in the Convention for the Maintenance, Preservation and Reestablishment of Peace, executed at this conference, and

3. That the following principles are accepted by the international American community:

(a) Proscription of territorial conquest and that, in consequence, no acquisition made through violence shall be recognized;

(b) Intervention by one State in the internal or external affairs of another State is condemned;

(c) Forcible collection of pecuniary debts is illegal; and

(d) Any difference or dispute between the American nations, whatever its nature or origin, shall be settled by the methods of conciliation, or full arbitration, or through operation of international justice.

The above-quoted resolutions of the Buenos Aires Conference were implemented at Lima in 1938 with a plan providing regular meetings of the foreign ministers of the American States or their representatives. So far, two of those Conferences have taken place, at Panama in October, 1939, as a result of the outbreak of the war, and at Havana, in July, 1940, to deal with certain specific problems arising out of the conflict.

In years to come, as a certain perspective is always indispensable for judging world events, it will be observed that American international law has been enriched with at least two modern interpretations of old conceptions, sovereignty and neutrality. As to the first, the American States have realized that the classical idea of sovereignty is antagonistic, in a modern world, to the necessity for cooperation, developed, as we have seen, in the essence of the resolutions of the Buenos Aires Conference.

The 1914 war and the present one have, on the other hand, also forced a revision of the classical concept of neutrality. It could not be otherwise when, in the present war, the American States as neutrals had only obligations without the benefits of their inherent rights. On this question, Mr. Robert Jackson, then Attorney General of the United States, at the first Inter-American Bar Association Conference in Havana early this year, quoting the Saavedra Lamas Anti-War Pact, developed an interesting thesis which in the future will serve as an important precedent on "active neutrality."

As to the second factor which has preponderantly hampered the promotion of good understanding, particularly between the United States and Canada, the bogey of "annexation," this has been finally disposed of by the Ogdensburg Agreement of August, 1940, and by the creation of a joint defense board including members of the staffs of the United States and Canadian Armies.

In sum, an American system has been developed and today actually constitutes a living organism, well rounded out by Canada's wholehearted adherence; parenthetically we may add that Canada has come to stay in the American household, regardless of the ultimate outcome of the European war.

Notwithstanding the unquestionable importance of our respective countries, this American system has the United States as center, and the United States will continue to be the center of the system for many years to come, particularly in matters of hemisphere defense. Let us not deceive ourselves in denying a fact which springs, by force of circumstance, from natural gravitation.

But one must go farther than that to ascertain the real foundation of American continental solidarity, a structure in which the law takes the place of the steel frame in a building.

One must take the long view of the elements making for such a solidarity.

Alvin H. Hansen, in a learned discussion of the subject, recommends that the people of the United States should discard certain ready-made preconceptions, or "bromides," as someone has called them, on the subject of Inter-American relations, such as the old, discredited shibboleth of "Latin-America," and he calls for "the perfection of relations inside this Hemisphere with a view to maintaining the interest of each and all vis-a-vis Europe."

But the position of the Western Hemisphere vis-a-vis Europe is only one part of a comprehensive interpretation of continental solidarity as a *fait-accompli*.

Let us revert to what we pointed out in the beginning as constituting the mission of the people of America, and let us examine the role to be played in this connection by the two races inhabiting our continent, the Latin and the Anglo-Saxon. From such examination these facts appear:

First, their destinies are not convergent or divergent, but they run on parallel lines, interdependently and complementing each other;

Second, their destinies will be fulfilled by preserving each race; guarding, one might say, with an almost religious zeal, their respective idiosyncrasies and characteristics;

Third, their common aim, their basic ground for understanding, is embodied in a new civilization which will continue, as the Romans did with the Hellenic culture, the tradition of a Europe that has completed its cycle;

Fourth, following that incontrovertible law of nature that human progress in its cycles follows the sun from East to West, this new civilization will be American and will be in the centuries to come our continent's contribution to world progress. It will be a civilization based and developed on the principle of regenerating virtue of labor, on the elimination of ancestral hates, class or caste prejudices, and on an endeavor to assure to a larger number of individuals as the nuclei of the whole structure a greater welfare and happiness.

Such is the ambitious task history reserves for America.

HON. WALTER P. ARMSTRONG

LOOKING AHEAD*

By HON. WALTER P. ARMSTRONG

President of The American Bar Association, 1941-42

YOUR gracious and generous words, Mr. President, touch me deeply. Praise from Sir Hubert Stanley is praise, indeed. I shall always remember these words were spoken of me by a man whose charm of manner, whose breadth of vision and whose capacity for leadership have earned for him the respect, admiration and affection of every member of the American Bar Association.

I have a deep appreciation of the honor that you have conferred upon me. I hope you will not think it immodest of me to say that I consider it the highest non-official honor that can come to an American lawyer. For many years the American Bar Association has been a sort of religion with me. I have found more pleasure and satisfaction in my work in the Association than in anything else I have ever undertaken. So while I fully realize that there are many others equally or more deserving than I, I yield to none in my belief in the Association's mission, my devotion to its cause and my determination by every means in my power to advance its interests.

I have a unique feeling about a recognition that comes to me from lawyers. They are so keen in their observance of one another and so realistic in their appraisals, that when one receives—whether or not one merits—their approval, one has at least survived an ordeal by battle.

Your lances have often found the chinks in my armor. Yet, in your generosity, you are willing that, for a little while, I should ride with the head of the column. I hope —I am determined I shall not fail you.

I shall say only enough to enable you to understand what I am trying to do throughout the coming year. This I do because this is the only opportunity I shall have to express in advance to the Association as a whole the vision I see.

It is not the prerogative of the President to determine the policy of the Association, though he has not only the right, but the duty of invoking, through proper channels, the action of the policy-making bodies upon subjects that he conceives to be of major importance. No President has a right to commit, or to seem to commit the Association either to any action or any view that is merely a personal hobby of his own.

Moreover, the only way we can hope to obtain our objectives is by reasonable continuity of policy. If we merely zigzag from point to point we shall arrive nowhere. I need seek no further for an illustration than to emphasize what folly it would be to forfeit the gains made during the past year by failing to carry on the constructive work done under the splendid leadership of President Lashly.

The President, however, should be no out-moded seismograph, quiescent except to record the will of the Association when it reaches temblor proportions. Subject always to the supervision of the House of Delegates and Board of Governors, he has room for selection, as to the emphasis he, at least, shall place upon the various activities of the Association. Not infrequently he must be the sole judge of the timeliness of presenting the various parts of the Association's program.

Moreover, from time to time questions arise as to which the President need not hesitate to take a position, even though the Association has not officially acted upon them. These are subjects upon which the views of the Association are clearly implicit because of what it has done or said upon other subjects, or as a matter of general policy. As to these the President should be able to sense the views of the Association and to express them with inerrancy and fidelity.

In short, my view is that I am your representative and not a mere delegate.

Because of world conditions, in which our own country is so deeply involved, one who would at this time venture to formulate an inexorable and inelastic program must either possess the vatic gift, or be recklessly foolhardy. I know I do not have the one. I hope I am not the other. Therefore, the things I shall say are, to some extent, necessarily tentative conclusions.

So far as is now forseeable, however, it seems that in the coming year the activities of the Association can be cast in a fairly symmetrical pattern. The American Bar Association is not a reactionary organization. Its record is not one of intransigency, but one of sane progress. It has opposed change only when convinced that the proposed change was unnecessary and was contrary to some fundamental tenet of our system of government. There is no place in our creed for "lost causes, forsaken beliefs and impossible loyalties." I

*Address as incoming President at Indianapolis Meeting, October 3, 1941.

would go even further—when changes are made that we would not have initiated we should yet assist in implementing and improving them so that they may function in a way best for all. We desire no place in the tent of the sulker. So, not wedded to the old, because of long accustomed, slow-pulsed acquiescence, and not enamored of the new because of a restless zest for change—we face the future—impatient with old abuses but somewhat skeptical of untried novelties, earnestly endeavoring to ascertain, to plan and to help achieve whatever is best, not for ourselves, but for our country.

Most of the objectives of our Association are long range objectives. Our Constitution speaks of some of them. Ours is the self-imposed task of advancing the science of jurisprudence, of promoting the administration of justice, in all its modern forms and forums, and of upholding the honor of the profession. Morever, we have a general welfare cause. We have assumed the burden of correlating the activities of the State Bar organizations in the interest of the public.

These are positions that cannot be taken by assault. There is no zero hour. The advance has not been fast—indeed, oft times so slow that some of us have been forced to accept the reluctant philosophy of Horace Mann, who, as he looked back upon the slow progress some of his reforms had made, consoled himself with the thought, "The trouble was that I was in a hurry and God was not." We have lost some redoubts. Our line has sometimes been pushed back, but it has remained unbroken. On the whole, we have not only steadily advanced, but have consolidated our gains.

I shall not trespass upon your time by attempting to catalog all the ships we have launched. We have promoted the administration of justice by serving for the duration in the long fight to reform Federal procedure. We have advanced the science of jurisprudence by helping revolutionize legal education. We have upheld the honor of the profession by formulating a code of ethics, and securing its acceptance by bar and bench. If we had accomplished only these things—and we have accomplished many more—we would at least in some measure have vitalized the vision that came to Judge Baldwin and his friends at Saratoga in 1878.

Not in an attempt to exhaust the list, but for the purpose of further illustration, I mention, also, the JOURNAL, uniform state laws, legal aid, unauthorized practice, law lists, judicial salaries, judicial selection and judicial tenure, and laws affecting the rights of employees on labor relations. My purpose in alluding to these is to emphasize my conviction that their importance must not be lost sight of because of the present emergency. Indeed, one of the dangers of any emergency is that its exigent demands may generate a forgetfulness of other things, whose importance may be temporarily obscured but is in no wise lessened.

Because of our financial situation and the demands of the present and the immediate future, we may temporarily not be able to treat some of these activities as generously as we should like. This must not be taken as evidence of any diminution of interest. One and all we realize that the momentum must not be lost before comes that happier time when they can resume full speed ahead.

Some of our objectives are so basically related to our system of government that efforts on their behalf are always timely. Even as to these, however, a due sense of proportion demands that the extent of our efforts vary from time to time according to the conditions that confront us. In this connection it seems to me that the time is at hand when the Association should not only not lessen, but, if possible, increase its efforts to deal with administrative tribunals in accordance with the principles formulated by the House of Delegates at the 1941 mid-winter meeting.

Our desire to subject the work of administrative tribunals to the scrutiny of the courts—to test the new method, to some extent at least, by the old—in no sense indicates a complacent satisfaction with the old. Contrariwise, we recognize the need of constant improvement. Nor are we unwilling to borrow from the new methods that will better implement the old. In the Federal field the Rules of Civil Procedure have revolutionized practice. The question of amending the Rules is now upon us. Here again the Association should take the initiative, especially in seeking to determine the best method by which proposed amendments can be brought before the court for its consideration.

The American Law Institute is sponsoring a code which will greatly liberalize the rules of evidence in those jurisdictions which adopt it. The Association should consider whether it will seek to have its principles accepted, especially in the Federal courts.

We have committed ourselves to the revision of the Judicial Code. We should consider whether the time is propitious now to press this work without incurring the danger of diminishing the jurisdiction of the Federal courts.

These things seem to me to fall within a single framework: proper judicial review of the adjudications of administrative tribunals, coupled with improvement and liberalization of the judicial process.

We cannot confine our efforts to the Federal courts. The impetus given to the reform of state practice by the Federal Rules of Civil Procedure has been stepped up many times by the untiring and constructive work

of the special Committee on Improving the Administration of Justice under the splendid leadership of Judge Parker. We must carry this work forward and to a conclusion, while the bar, the bench, and the people are in the mood, and while the vast store of accumulated material is available. We have repeatedly professed our faith in the courts. We must now demonstrate our ability to equip them to cope with present day demands.

But beyond all this, wherever we turn, we recognize the impact of the gravity of the hour in the lines of every face we see. We are endeavoring and shall endeavor by all means in our power to contribute to national defense.

We have been fortunate in the constructive leadership of President Lashly. Mr. Beckwith's committee has vindicated its claim that the organized bar is the people's lawyer. The Committee on Coordination of National Defense has made a substantial contribution by assisting in formulating legislation.

In this defense program I think we can also find a harmonious design: aid to service men and their families; defense legislation; our duty as phrased by the Bill of Rights Committee in its report "to give the fullest cooperation to the country during this grave period, and yet forestall that hysteria which always tends toward the obliteration of civil rights or unnecessary limitations of them."

With these things I would couple and suggest the expansion of the work of the Junior Bar Conference and the standing committee on American Citizenship, whose chartered purpose is "to devise ways and means for promoting the study of and devotion to American institutions and ideals."

I have spoken to you of concrete things. We have a job to do and can not content ourselves with pious hopes. There is, however, something that seems to me to pervade all that I have said—something that is innate in all that we do or attempt to do: the existence and efficient organization of an independent and courageous bar are essential to the proper functioning of a democracy such as ours. To you I need not elaborate upon this belief, nor give reasons. This only do I say: the decadence of the bar would be among the greatest disasters that could befall our way of life. But it will not decay. It will survive—survive with ever-growing strength—survive because the American Bar Association will give to the lawyers of America leadership—leadership which will show them how they can and must continue to be as they have always been, one of the most salutary influences in American life.

President Lashly has dealt adequately and eloquently with the imponderables that pervade the present emergency. There is little I need add, except emphatically to associate myself with what he has said. We are all agreed that the success of the forces of evil which are personified in Hitler would be a grave and imminent threat, not only to the ideals of liberty, which we have always cherished, to the freedom of religion which we have always held sacred, but to our national security itself. The forces against which we are arrayed are, for the present, at least, disciplined forces moving with insensate and almost insane fury at the will of one man. To me it seems a self-evident fact that a democracy such as ours can not combat these forces unless it imposes upon itself severe self-discipline. In helping the American people attain this self-discipline, the bar of America can render significant service. Aside from those who hold responsible public offices, lawyers, by training and experience, constitute the group best fitted to lead public opinion. Indeed, in this the members of the bar have one advantage over those charged with the duties of office. They are answerable only to their own consciences, and not to any constituent. They need have no fear that they will advance so rapidly that they will lose contact with their followers. The time has come for plain speaking. The American people must be told not only boldly, but bluntly, the need for self-discipline to which I have alluded; a discipline that must loyally and unanimously support the decisions of our government after they are made without carping criticism or partisan bickering,—not the suppression of free speech, but the expression of informed patriotism; a discipline which will generate a public opinion which will irresistibly demand that those engaged in production begin to forget themselves and to think of their country; a discipline that will create in our minds an awareness that if the elimination of Hitler and Hitlerism is essential to our security the time is almost at hand when the question of how that can most effectively be accomplished is one largely of strategy for those best informed and in authority; a discipline which will make us realize that it is futile merely to strive for fancied security for weeks, months, or even a few short years—which will make us realize we are charting a course not only for ourselves, but for our children and our children's children—that must make us tough-fibred enough to give, if necessary, our today for their tomorrow.

As urgent and as necessary a thing as this discipline is, it can only be achieved by the people themselves. Upon whether or not they can achieve it—short of a great ground swell of emotional patriotism engendered by actual armed conflict—depends in large part the future of our country. Realistically to aid in fostering this discipline furnishes the greatest opportunity and the most serious responsibility that have come or can come to the bar in our time.

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

Edgar B. Tolman, Editor-in-Chief	Chicago, Ill.
Walter P. Armstrong, *President of Association*	Memphis, Tenn.
Guy Richards Crump, *Chairman House of Delegates*	Los Angeles, Cal.
William L. Ransom	New York City
Charles P. Megan	Chicago, Ill.
James Grafton Rogers	New Haven, Conn.
Reginald Heber Smith	Boston, Mass.
Thomas B. Gay	Richmond, Va.

General subscription price $3 a year. Students in Law Schools, $1.50 a year. Price per copy, 25 cents.

MANAGING EDITOR

Urban A. Lavery, 1140 N. Dearborn St. Chicago, Ill.

Our "Convention Number"

THIS issue of the JOURNAL is appropriately devoted for the most part to the proceedings of the 1941 Annual Meeting of the Association, held in Indianapolis, and to several of the outstanding addresses before that notable gathering of American lawyers. For the quantity as well as the quality of interesting material adduced by the meeting, even the increased number of pages in our present issue is insufficient. Most regretfully, we leave many outstanding features of these sessions to be covered in our December issue.

It was a dynamic and worth-while meeting. No other appraisal could be made, from the contents of these pages. The attendance was larger than had been expected this year, under the country-wide conditions. The sessions were full of interest and lively discussions. The whole meeting was alive with patriotic feeling and with manifest purpose that the organized lawyers shall do their part in the common defense of law-governed institutions and liberties.

The Sections made unusually important contributions to the meeting, through their vital programs. The Assembly sessions were replete with interest and with significant events, as the chronicle of its proceedings shows. The representative House of Delegates transacted its heavy calendar of business in the deliberative and painstaking manner which comes with maturity and experience. The detailed account of the proceedings of the House is necessarily held for our December issue.

President Lashly's stirring address on the first day set high standards which the meeting maintained. It was the climax of his year of intense but friendly and kindly devotion to the work of the Association and the profession. Incoming President Armstrong made an earnest and eloquent statement of the objectives of the Association and his concept of the lawyer's duty in these times. Each of these addresses should be read carefully by every member of the Association. An organization which is faithful and militant in behalf of these declared principles is likely to earn and receive the approbation and the cooperation of patriotic citizens throughout the land.

A Classic Discussion of Administrative Law

AN outstanding feature of the Annual Meeting was the discussion of the administrative agencies and their procedures, by Attorney General Francis Biddle and Dean Roscoe Pound, under the auspices of the energetic Section of Judicial Administration. Not often in the annals of the Association do addresses before it take on so unmistakably the character of a public event of first and lasting importance.

The usefulness of the agencies and the arguments for flexibility in their procedure, as against legislative or judicial curbs, were comprehensively and cogently presented by the Attorney General, who has most actively concerned himself with this field of Federal law. That his conclusions were at variance with the declared policy and objectives of the American Bar Association does not leave us lacking in appreciation of the significance and the worth of his statement. The Association was honored to have the opposing views set forth so ably under its aegis.

Dean Pound gave a scholarly survey and appraisal of many of the agencies, and depicted various tendencies which he found to be operative in them, to such an extent as to call for remedy, in large part by legislation. It may fairly be pointed out that his keen analysis showed plainly the basis and the urgent need for the Association's long efforts to improve the administration of justice as entrusted to the agencies. Indeed, Dean Pound's presentation serves to make clear the moderate and constructive character of the "minority" bill (S. 674) drafted by Messrs. McFarland, Stason and Vanderbilt (with the support of Chief Justice Groner except in two respects as to which he believed the bill should go further), in The Attorney General's Committee on Administrative Procedure, and the Association's present endorsement of that bill as the best thus far offered. Dean Pound's argument, when carefully studied, will lead at least some members of the Association to support more drastic action or the decision of some State Bar Associations to continue their adherence to the Walter-Logan bill.

Looking back at the joinder of issue between the eminent participants, it seems regrettable that the Attorney General did not, in his discussion, address his remarks more inclusively to the minority proposals in their *present* form. The "minority" in the Attorney General's Committee, who drafted S. 674 for consideration, concluded their draft with the statement that their formulations would necessarily require and receive revision after "hearing all agencies and considering all points of view." When the Senate sub-committee hearings were concluded, the "minority" group promptly submitted a joint statement which analyzed the whole situation and summarized all

objections to their original draft of S. 674. This "minority" statement then either answered each objection briefly or, conceding its propriety, made what was deemed to be the appropriate change in S. 674 to meet the point made. With this joint statement, recently printed as a pamphlet by the Government Printing Office (although not at Government expense), the "minority" group submitted their revised and improved form of S. 674. A timely and accurate discussion of the "majority" and "minority" proposals from the Attorney General's Committee should therefore take into account, and be based on, the perfected form of the "minority" proposals for legislation.

In any event, the JOURNAL feels that it is rendering a notable service to the profession and to the public in publishing in full in this issue the addresses of Messrs. Biddle and Pound. Members will do well to preserve this issue for reference, as these addresses will be historic in future discussions, as well as useful in the briefing of administrative law questions. With Dean Pound's address are published also his annotations in full, which will be found of especial value because of their extensive citation of State as well as Federal decisions in the field of administrative law.

Changes in Board of Editors

UPON the adjournment of the Annual Meeting, several changes in the membership of the Board of Editors of THE JOURNAL became effective.

Because his election as President of the Association makes him an *ex officio* member of the Board of Editors, Walter P. Armstrong, of Tennessee, who has been an invaluable member of the Board for many years, resigned as an elective member. He thus continues as an *ex officio* member in succession to retiring President Lashly, who has given a great deal of time and thought to the work of the Board.

For Mr. Armstrong's unexpired elective term, Professor James Grafton Rogers, of the Yale Law School, was chosen. Long an active participant in Association work and distinguished as the author of "American Bar Leaders" (1932) and other books, his varied and scholarly career in the teaching and practice of the law, as well as his experience as Assistant Secretary of State, make him a most fortunate addition to the Board.

Gurney E. Newlin, of California, who has given a great deal of useful service to the Board, advised that he could not accept re-election. In his place, Thomas B. Gay, of Virginia, was elected by the Board of Governors for the full term, upon his retirement as Chairman of the House of Delegates. In that capacity, he has been an *ex officio* member of the Board for three years, and has shown fine aptitude for its supervisory tasks. Representation of the Pacific Coast in the Board of Editors is continued by the accession of Guy R. Crump, of California, *ex officio* as Chairman of the House of Delegates. By reason of his years of activity in the work of the Association as well as in the California State Bar, Mr. Crump is heartily welcomed to the Board.

Lawyers in a Time of Change

ALMOST every American lawyer has lately been taking stock, according to the habit of trained minds, as to what should be the attitude and the objectives of members of the profession, individually and through its organizations, along with other thoughtful citizens, in the present crisis affecting our country. Incoming President Armstrong, in his incisive remarks on taking office at the close of the 1941 Annual Meeting, tried to put into words what is probably the consensus of reasoned opinion. Some of his sentences strike home:

> The only way we can hope to attain our objectives is by reasonable continuity of policy. If we merely zigzag from point to point we shall arrive nowhere.
>
> The American Bar Association is not a reactionary organization. Its record is not one of intransigency, but of sane progress.
>
> We desire no place in the tent of the sulker.
>
> When changes are made that we would not have initiated we should yet assist in implementing and improving them so that they may function in a way best for all.
>
> One of the dangers of any emergency is that its exigent demands may generate a forgetfulness of other things, whose importance may be temporarily obscured but is in no wise lessened.
>
> The existence and efficient organization of an independent and courageous Bar are essential to the proper functioning of a democracy such as ours.
>
> The American people must be told not only boldly, but bluntly, the need for self discipline * * * a discipline that must loyally and unanimously support the decisions of our government after they are made, without carping criticism or partisan bickering—not the suppression of free speech but the expression of informed patriotism * * * The time is at hand when the question of how that [the elimination of Hitlerism] can most effectively be accomplished is one largely of strategy for those best informed and in authority.

President Armstrong's whole address was indeed the expression of an enlightened and forward-looking militancy—a rallying cry to which the organized Bar should respond with renewed zeal, in the performance of the patriotic tasks which devolve upon the American lawyer.

Our Annual Report Volumes

SEVERAL incidents of the Indianapolis sessions furnished fresh confirmation of the continuing usefulness of the Annual Report volume which comes each year to the members of the Association. By some it is questioned from time to time whether it is worth while to invest funds of the Association in a volume so infrequently read or used except for reference.

(Continued on page 727)

Louis Dembitz Brandeis

LOUIS DEMBITZ BRANDEIS

1856-1941

THE death of Associate Justice Louis Dembitz Brandeis, who retired from the Supreme Court in February of 1939, ended a career of high distinction, and took from the American scene one of its elder statesmen, a lawyer and jurist who had profoundly influenced the whole course of American law under the written Constitution. At the age of 84, he had been living in Washington, serene in the accomplishments of his completed work and keen in his enjoyment of the company of congenial friends, until failing health struck him down.

He was born in Louisville, Kentucky, on November 13, 1856, the son of cultured and well-to-do immigrants from Bohemia. His ancestors had fought for freedom, in Poland and Bohemia. When his family took him to Germany for schooling, he did not like it. Returning to America, he worked his way through the Harvard Law School when his father lost his money. He was graduated with the highest honors, at the age of twenty, under a special rule to permit his graduation. He studied awhile longer at Harvard, went to St. Louis to practice law, and returned soon to Boston, to enter upon the active professional career which carried him into many great battles in the law and enabled him to scale the heights.

He first appeared before the Supreme Court in November of 1889. Not long afterwards, Chief Justice Melville W. Fuller called him "the ablest man who has ever appeared before the Supreme Court of the United States." He had a passion for facts and a rare skill in presenting them. He made money easily, won wide renown, and wielded his lance vigorously in behalf of many popular causes.

When he was appointed to the Supreme Court by President Wilson in 1916, to succeed Associate Justice Joseph E. Lamar, the opinion of the Bar divided sharply as to the wisdom of elevating to the Court so zealous an advocate. Confirmation was voted, 47 to 22, by the Senate; and he took the oath of office on June 5, 1916.

It is not within the purpose of this memorial to analyze or appraise his work in the Court, or to refer to the controversies which have been waged as to his philosophy and some of his decisions. In the great Court, he soon was recognized as both an orderly-minded pragmatist and a great humanitarian. He steered his own course according to his own deep convictions, fortified by his habits of tireless work and prodigious research. Repeatedly his vote in the Court was against the validity of legislation sponsored by men who were his devoted followers and friends. "Holmes and Brandeis, JJ., dissenting" became a familiar notation; but he lived to see many of his minority views become later the law of the land.

When the proposal was made, in February of 1939, to "enlarge" the Supreme Court by appointing an additional Associate Justice for each member of the Court who attained a retirement age of seventy years, Mr. Justice Brandeis was eighty years old and at the height of his epoch-marking service. With Chief Justice Hughes and others of the Court, he signed a letter which made it clear that the court was in fact abreast of its work and that "enlargement" would impair its efficiency. This letter, together with the living refutation of the claim that judges at the age of seventy could not do the work, did much to sustain the American Bar Association's successful opposition to "enlargement."

The passing of so colorful and beloved an American, even after his work was done, brings a sense of regret, both to his followers and to those who disagreed with him. Time has brought a deepened appreciation of his public services.

As Chief Justice Stone said of him at the opening of the 1941 Term on October 6th:

> With profound sorrow I announce the death last evening of Louis Dembitz Brandeis. For nearly twenty-three years he was in active service as an Associate Justice of this Court, and from February 13, 1939, when he exercised his right of retirement, and until his death, he was a retired Justice of this Court.
>
> Learned in the law, with wide experience in the practice of his profession, he brought to the service of the Court and of his country rare sagacity and wisdom, prophetic vision, and an influence which derived power from the integrity of his character and his ardent attachment to the highest interests of the Court as the implement of government under a written constitution. His death brings to a close a career of high distinction, and a life of tireless devotion to the public good.
>
> The funeral service will be private. There will be a public memorial service at a time and place to be later announced.
>
> As a mark of respect to Justice Brandeis' memory the Court will adjourn without transacting further business.

THE CHALLENGE OF INTERNATIONAL LAWLESSNESS*

By ROBERT H. JACKSON

Associate Justice of the Supreme Court of the United States

WE LAWYERS would commit only a pardonable larceny if we should appropriate as an affirmation of the ideals of the legal profession a prayer from ancient liturgy:

> . . . Grant us grace fearlessly to contend against evil, and to make no peace with oppression; and, that we may reverently use our freedom, help us to employ it in the maintenance of justice among men and nations . . .

As men experienced in the conduct of legal institutions which, among men, have largely displaced violence by adjudication, we should have some practical competence in measures to maintain justice among nations.

The Roosevelt-Churchill conference has directed discussion toward the implications of the war in terms of peace. But our people are still thinking cynically of all peace plans, for they feel frustrated and aggrieved at the interruption of a peace they had thought to be permanent. At the end of the World War our people divided into a group who were sure war was ended, because a war to end war had resulted in a fairly comprehensive organization of world powers, and an opposing group who were confident that they had assured our peace by keeping the United States out of it. Now, both awaken in disillusionment—the one to find the world not so well organized for peace as they had believed, and the other to find the United States not so well isolated from war as they had supposed.

I share the public disappointment at the renewal of war as a means of settling the problems of Europe, because I also shared some of the choice illusions of my time. But I cannot let faith be crushed, although the law of the jungle tarries long among nations and achievement of an international order based on reason and justice even now seems remote. The history of our experience with the slow but solid evolution of domestic law[1] keeps me from expecting miracles on the one hand and from becoming cynical, on the other.

Stability of International Law

The fact is that under today's political and economic chaos there is actually functioning a relatively stable body of customary and conventional international law as a foundation on which the future may build. Lodged deeply in the culture of the world, unaffected by the transitory political structures above it, is a bedrock belief in a system of higher law. Entrenched dictators spend no end of effort to persuade their own people that they are not lawbreakers and to rationalize their policies for a law-conscious public opinion. Not one of them today would dare to boast, as did Von Bethmann-Holweg at the opening of the World War, that he is violating international law.

Treaties, except some of the great political ones, are, contrary to a general impression, still usually applied; prisoners of war are being treated pretty generally in accordance with treaty stipulations; there are few, if any, allegations that the sick and wounded are not being treated in accordance with the Geneva Red Cross Convention. Foreign offices of all nations in protesting actions thought to be in violation of customary international law or treaty provisions, pay tacit recognition to the existence and validity of a standard of conduct higher than the transient will of officials. Various departments of the government, in addition to the Department of State, have added international law scholars to their staffs; legal arguments are steadily exchanged between foreign offices concerning international disputes, many of which are still decided on this basis.

Diplomats, together with embassies and legations, are still accorded their proper immunities, and Axis diplomats and consuls are being sent home as *personae non gratae* for overstepping the bounds of their privileges.

Our nationals abroad are still protected; aliens still generally have the benefit of the international rules respecting them; criminals are extradicted pursuant to treaty; prize courts still function under international rules and in the domestic courts of the United States, as well as of the other principal powers of the world, pleas are still made to international law and decisions are rendered in accordance with its principles.

Moreover, new concepts are competing for recognition; war is being waged today, not only in self-defense but upon the ground that aggressors are lawbreakers and outlaws; international sanctions are being applied; assets which would otherwise fall into the hands of aggressors are being frozen; commerce is being protected on the high seas against their paper blockades; the principle of the freedom of the seas is being actively defended; the implications of the principle of self-defense are being clarified; and an enlargement of the heretofore indefinite concept of piracy is perhaps developing.

*Address delivered at Annual Dinner of American Bar Association, Indianapolis Meeting, October 2, 1941.

1. Sir Frederick Pollock, writing of the state of English law just before the Norman conquest, says:

> "But this reign of law did not come by nature; it has been slowly and laboriously won. Jurisdiction began, it seems, with being merely voluntary, derived not from the authority of the State but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honour to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under a treaty between sovereign States can compel the rulers of those States to fulfil its award. Anglo-Saxon courts had got beyond this most early stage, but not very far beyond it."—

"English Law Before the Norman Conquest" in *Select Essays in Anglo-American Legal History*. Boston: Little, Brown, and Company; 1907. Vol. I. P. 95.

Existing International Institutions

Passing from substantive law to international institutions, we have the League of Nations, its system of mandates, the International Labour Organization and, last but not least, the Permanent Court of International Justice. Although these do not meet the needs of the world, they have many features that represent solid progress and which I am convinced the world cannot afford to throw away.

The League of Nations, for all of its defects and in spite of all that it has left undone, has had a wholesome influence on the international thought and habit of our time. The Covenant required publicity and registration of treaties, and it authorized recommendations to reconsider treaties which became inapplicable. A more enlightened concept of trusteeship underlies the system of mandates for backward people created by the Covenant. It required mediation, arbitration, or conciliation of certain classes of controversies, and it provided for the establishment of a Permanent Court of International Justice for the adjudication of justiciable controversies. Moreover, the League Covenant, in limiting the right of war, created new obligations of good conduct. It departed sharply from the older doctrine that, in respect of their right to make war, sovereign states were above both the discipline and the judgments of any law, and that their acts of war were to be accepted as legal and just. Instead, for its members it created a category of forbidden and illegal wars—wars of aggression. It made resort to war in violation of the Covenant an act of war against all other members of the League. It provided economic sanctions to be invoked against the aggressor. Even if it was not able to end unlawful wars, it ended the concept that all wars must be accepted by the world as lawful.

Kellogg-Briand Pact

The League, which we rejected, was followed by the Kellogg-Briand Pact. By it the signatory nations renounced war as an instrument of national policy and agreed that the settlement of all disputes or conflicts of whatever nature or of whatever origin should be sought only by pacific means. While the United States became a party to this treaty, Secretary Kellogg said that it was out of the question to impose any obligation respecting sanctions on the United States. The Senate proceedings make clear that its ratification was due only to the assurance that it provided no specific sanction or commitment to enforce it.

This treaty, however, was not wholly sterile despite the absence of an express legal *duty* of enforcement. It had legal consequences more substantial than its political ones. It created substantive law of national conduct for its signatories and there resulted a *right* to enforce it by the general sanctions of international law. The fact that Germany went to war in breach of its treaty discharged our own country from what might otherwise have been regarded as a legal obligation of impartial treatment towards the belligerents.[2]

None Able to Prevent War

Regardless, however, of these juridical consequences, the disillusioning fact is that neither the League nor the Kellogg-Briand Pact proved adequate to prevent war. Whether they did not actually induce a false sense of security which contributed to the undoing of those who relied on their promise is an open question. That a signatory state may lawfully support a war to punish an illegal war may mean merely bigger and better wars. It is a rough international equivalent of the ancient "hue and cry" procedure, which involved the whole community in the troubles of an individual. What we seek is to prevent, not to intensify and spread, wars. And that tranquility can rest only upon an order that will make justice obtainable for peoples as it is now for men.

Our institutions of international cooperation are neither time-tried nor strong, but it is hard to believe that the world would forego some organ of continuous consideration of international problems or scrap what seems to be a workable, if not perfect, pattern of international adjudicative machinery.

Defects of League

It is not difficult with the aid of hindsight to point out structural defects in the League or to complain of the timid use made of such powers as it had. But we can no more dismiss as a failure all international organization because the League did not prevent renewal of war between nations than we can dismiss our federal government as a failure because it did not prevent a war between its constituent states.

Intelligent opinion should not visit upon struggling international instrumentalities that condemnation which rightly may be visited upon the selfishly nationalistic policies of several nations. We must place blame only where there was power. Too many people forget that the League was merely a collective annex of foreign offices. The dependence of the League on the policy of home governments was never better stated than years ago by Sir Arthur Salter:[3]

> The League is an instrument through which the real desire of the world for international cooperation can find expression and be put into effect. . . . But it is not, and cannot be, a short cut to supreme control. It cannot enable the best part of the world to impose its will upon a hostile, an indifferent, or an apathetic majority. It is an instrument and not an original source of power. It is a medium, but a medium only, through which the desire of the world can find expression.
>
> Moreover, the League under the Covenant is based upon existing national authorities. The members both of the Council and of the Assembly are nominated by Governments. It therefore expresses the will of the world indirectly, not directly by a parallel form of popular representation. Those who care most for the ideals on which the League was founded can indeed use the League itself in many ways to mobilize and concentrate their forces. But the route to *action* lies first through the national electorates and the various national media through which the policy of national Governments can be affected.

2. See Address delivered by Attorney General Robert H. Jackson before the Inter-American Bar Association, Havana, Cuba, March 27, 1941. American Bar Association Journal, May 1941, p.275; 35 American Journal of International Law, p.548.

3. Salter, Sir J. A.: "Allied Shipping Control" in *Economic and Social History of the World War*. Oxford: At the Clarendon Press; 1921. Carnegie Endowment for International Peace. pp. 264-65.

The League's position as foreign office subsidiary was probably inevitable, but it was unfortunate for the peace of the world. A diplomat suffers less risk to his personal career if he can hush a delicate issue than if he brings it to the surface and tries to meet it with long-term remedies. The foreign office genius for suppressing issues rather than solving them was the common denominator of all nationalistic representation and became the chief, if not in fact the only, policy of the League.

Sumner Welles, in a really notable address, has aptly said:[4]

> The League of Nations, as he (Wilson) conceived it, failed in part because of the blind selfishness of men here in the United States, as well as in other parts of the world; it failed because of its utilization by certain powers primarily to advance their own political and commercial ambitions; but it failed chiefly because of the fact that it was forced to operate, by those who dominated its councils, as a means of maintaining the *status quo*. It was never enabled to operate as its chief spokesman had intended, as an elastic and impartial instrument in bringing about peaceful and equitable adjustments between nations as time and circumstance proved necessary.
>
> Some adequate instrumentality must unquestionably be found to achieve such adjustments when the nations of the earth again undertake the task of restoring law and order to a disastrously shaken world.

Need for Flexibility

We now see that such an instrumentality, if it is to compose the world's discord, must have flexibility. Neither maps nor economic advantages nor political systems can be frozen in a treaty. Peace is more than the fossilized remains of an international conclave. It cannot be static in a moving world. Peace must function as a going concern, as a way of life with a dynamic of its own. Unfortunately, however, the internal structure of the League loaded the dice in favor of the perpetuation of the *status quo* which was also the policy of the dominant powers and the governing classes within them. Any peace that is indissolubly wedded to a *status quo*—any *status quo*—is doomed from the beginning. The world will not forego movement and progress and readjustments as the price of peace. Where there is no escape from the weight of the *status quo* except war, we will have war. Perhaps if that is the only escape, we should sometimes have war.

The Assembly of the League could advise "reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."[5] That promise to the ear was, however, broken to the hope by the provision that action be only by unanimous consent. Any one dissenting member government could thus perpetuate the *status quo*, though all the world knew it was at the price of eventual war. This was a fatal situation when the *status quo* in Europe was an experimental and in some respects an artificial one established by victors in an hour of heat and hate.

4. Address by the Honorable Sumner Welles, Acting Secretary of State, at the laying of the cornerstone of the new wing of the Norwegian Legation in Washington, D.C., July 22, 1941.

5. Article 19.

Supremacy of Law

The world will not, I trust, be naive enough again to believe it has so reordered its affairs as to prevent conflicts that might provoke wars. The supremacy of domestic law is not based on an absence of individual conflicts. It is predicated on a settlement of them by means that do not violate the peace of the community. The law anticipates a certain amount of wrong conduct, for which it provides damages or punishments. It does not end injustices, but it requires the victims to seek redress through the force of the law, rather than through their own strength.

In this we have to abide the imperfections of legal institutions. I am not convinced, even by my own transfiguration into a Justice of the Supreme Court, that courts have overcome the hazard of wrong decision and of occasional injustice. The triumph of the law is not in always ending conflicts *rightly*, but in ending them *peaceably*. And we may be certain that we do less injustice by the worst processes of the law than would be done by the best use of violence. We cannot await a perfect international tribunal or legislature before proscribing resort to violence even in case of legitimate grievance. We did not await the perfect court before stopping men from settling their differences with brass knuckles.

But even if we achieve a formula for order under law among all or among a considerable number of like-minded nations, we may as well recognize that its instrumentalities of justice and of adjustment will give us little security unless we give them a more real support than in the past. There is no dependence on a peace that is everybody's prayer but nobody's business. Peace declarations are no more self-enforcing than are declarations of war. Peace without burdens will no more come to a world that will not assume its risks than domestic peace would come to a community that would not assume the burdens and risks of a force of peace officers and courts for judging offenders and a form of political organization that commits the physical force of the community to support the peace officer, if necessary.

Law Tested by "the Bad Man"

The American people seem to have believed, and some scholars have asserted, that international law can operate by the voluntary acceptance on the part of well disposed powers. But Mr. Justice Holmes pointed out that we cannot test our law by the conduct of the good man who probably behaves from moral or social considerations. The test of the efficiency of the law, he said, is the bad man who cares only for material consequences to himself. Said Holmes:[6]

> A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

6. Holmes, Oliver Wendell: *Collected Legal Papers*. New York; Harcourt, Brace and Company; 1920, p. 170.

The world is in war today chiefly because its civilization had not been so organized as to impress the "bad man" with the advisability of keeping the peace.

The German people might not have supported a war of Nazi aggression, had there been explicit understanding that it would bring against them the array of force they now face. Everything indicates that Hitler's early steps were cautious and tentative and calculated to test out the spirit and solidarity of the rest of the world. Shirer asserts, and we find little reason to doubt, that Hitler was successful in recreating the conscript army in violation of the military provisions of the Treaty of Versailles, only because of default of opposition from the former Allies.[7] He also says that when Hitler sent troops to occupy the demilitarized zone of the Rhineland, in violation of the Locarno Treaty, the troops had strict orders to retreat if the French army opposed them in any way. They were not prepared or equipped to fight a regular army.[8] Peace appears to have been lost, not for the want of a great supporting force, but for the want of only a little supporting force.

Alternative for America

It is in the light of such facts that America will face a tough and fateful decision as to her attitude towards the peace. It is a grave thing to risk the commitments that are indispensable to a system of international justice and collective security. It is an equally grave thing to perpetuate by our inaction an anarchic international condition in which every state may go to war with impunity whenever its interests are thought to be served.

But it is a perilous thing to neglect our own defenses as if we were in a world of real security and at the same time to reject the obligations which might make real security possible. At the end of this war we must either throw the full weight of American influence to the support of an international order based on law, or we must outstrip the world in naval and air, and perhaps in military, force. No reservation to a treaty can let us have our cake and eat it too.

The tragedy and the irony of our present position is that we who would make no commitment to support world peace are making contributions a thousandfold greater to support a world war. We who would not agree to even economic sanctions to discourage infraction of the peace are now imposing those very sanctions against half the world in an effort to turn the fortunes of war.

7. Shirer, William L.: *Berlin Diary*. New York: Alfred A. Knopf; 1941. p. 30.
8. Id., p. 56.

Roosevelt-Churchill Conference

The Roosevelt-Churchill "Atlantic Charter" promises aid to all "practical measures which will lighten for peace-loving peoples the crushing burden of armaments." Certainly, the present competition, if continued, threatens the financial and social stability of free governments. Vast standing military establishments and the interests that thrive on them and the state of mind they engender are no more compatible with liberty in America than they have been in Europe. Five years of the sort of thing the world now witnesses and twenty centuries of civilization will not be worth a tinker's dam.

The Roosevelt-Churchill statement affirms that all nations "must come to the abandonment of the use of force" and it envisions the "establishment of a wider and permanent system of general security." Such happy days wait upon great improvement in our international law and in our organs of international legislation and adjudication. Only by well considered steps toward closer international cooperation and more certain justice can the sacrifices which we are resolved to make be justified. The conquest of lawlessness and violence among the nations is a challenge to modern legal and political organizing genius.

Men of our tradition will take up the challenge gladly. We have never been able to accept as an ultimate principle the doctrine that, in vital matters of war and peace, each sovereign power must be free of all restraint except the will and conscience of its transitory rulers. Long ago English lawyers rejected lawlessness as a prerogative of the Crown and bound their king by rules of law so that he might not invade the poorest home without a warrant. In the same high tradition our forefathers set up a sovereign nation whose legislative and executive and judicial branches are deprived of legal power to do many things that might encroach upon our freedoms. Our Anglo-American philosophy of political organization denies the concept of arbitrary and unlimited power in any governing body. Hence, we see nothing revolutionary or visionary in the concept of a reign of law, to which sovereign nations will defer, designed to protect the peace of the society of nations. We, as lawyers, hold fast to the ideal of an international order existing under law and equipped with instrumentalities able and willing to maintain its supremacy, and we renew our dedication to the task of pushing back the frontiers of anarchy and of maintaining justice under the law among men and nations.

THE CODE OF EVIDENCE PROPOSED BY THE AMERICAN LAW INSTITUTE

By PROFESSOR EDMUND M. MORGAN

Harvard Law School

(CONTINUED FROM OCTOBER JOURNAL)

G—Hearsay

The essays of the great Thayer, the rationalizations of the judges beginning in the third or fourth decade of the 19th century and the acceptance of these by Wigmore have combined to make orthodox the fallacy that the exclusionary rules of evidence, and particularly, the hearsay rule, are results of the jury system. The truth is that they are products of the adversary system; in almost all jurisdictions they are enforced only at the behest of the adversary; and today, as in the earliest cases, lack of oath and lack of opportunity for cross-examination are the reasons advanced for the exclusion of hearsay. Lack of oath is never stressed; and, unfortunate as it may be, it is now generally recognized that the oath has lost most of its efficacy as a sanction. If lack of opportunity for cross-examination is the real basis for exclusion, as is now almost universally conceded, it must be because cross-examination may eliminate the imperfections in testimony likely to mislead the trier of fact.

It is clear that the perception, memory, narration and sincerity of a witness may be tested by an intelligent cross-examination. Of these four narration is likely to be the least important. The uncertainties in the use of language are present wherever words are reported. This is no less true where the words have operative effect than where they are narrative. The dangers of their unusual use are no greater than the dangers involved in the interpretation of non-verbal conduct. While experience in the court-room and out furnishes examples of the value of testing a declarant's vocabulary, it is rarely, if ever, that a judicial opinion relies upon the danger of peculiar use of language by a declarant as a justification for excluding hearsay or the lack of the danger as a justification for creating an exception. Defects in perception or memory and lack of sincerity or veracity are the objects of emphasis; and court-room experience makes it clear that the two former are of major importance. At any rate a cross-examiner frequently discloses imperfections as to observation and memory, while it is a rare case where he uncovers deliberate falsehood. The commonly repeated charge of rampant successful perjury in the court-room is a demonstration of the futility of cross-examination to uncover it. Consequently, if the courts were really concerned to exclude evidence wherever there is danger of defects in observation or memory or danger of lack of sincerity, hearsay would be defined as evidence of any conduct of a person which requires a trier of fact to rely upon his perception, memory or sincerity, unless the conduct is a part of his testimony as a witness at the trial. Obviously, however, the courts receive volumes of such evidence when it does not consist of assertions or narratives. Any rule excluding hearsay so defined would have many more exceptions than applications. By the exclusion of all such evidence rational investigation would be impossible. Indeed most of the courts confine hearsay to conduct which amounts to an assertion, evidence of which is offered to prove the truth of the matter asserted; and even so, much hearsay is admitted.

In the early 1800's the courts were fond of saying that there were only two or three exceptional situations in which hearsay was received. Now at least eighteen different varieties may be found, each of which has some respectable authority to support it. In almost every one of these eighteen there are qualifications and limitations. Mr. Wigmore devotes 1145 pages to the hearsay rule and its exceptions, not including confessions and admissions, which require 304 additional pages—a total of 1449 pages. To make the subject appear to have some coherence he puts admissions, confessions and former testimony outside the realm of hearsay; this enables him to discover in each of the exceptions something which he calls a guaranty of trustworthiness—a something which amounts to nothing more than a situation in which the ordinary person in making the declaration would usually desire to tell the truth or would have no motive to falsify. It will be noted that this explanation goes at most to sincerity; it does not touch perception or memory.

The truth is that the subject has no coherence. The present law as to hearsay is a conglomeration of inconsistencies due to the application of competing notions and historical accidents. In the orthodox treatment of former testimony the most rigorous adherence to the adversary theory is manifested. Testimony given under oath and subject to cross-examination by the very person against whom it is now offered is rejected merely because it would not be receivable if offered against the proponent. In admissions, personal or authorized, even testimonial qualifications of the declarant are disregarded, because a party cannot object to lack of oppor-

tunity to cross-examine himself. In most of the other exceptions there is not a semblance of a substitute for cross-examination. To reject statements made with all the safeguards surrounding the giving of testimony in open court and to admit pedigree statements by a remote blood relative; to admit dying declarations in criminal prosecutions for homicide and to reject them in other criminal and in all civil actions; to admit declarations against pecuniary interest and to exclude declarations against penal interest; to hamper the use of business entries by restrictions devised to care for entries by interested parties in shop books at a time when parties to an action were incompetent as witnesses; to receive a copy of a record of a deed as evidence that the purported grantor signed, sealed and delivered it and to reject a judgment of conviction in a criminal case as evidence that the defendant committed the offense of which he was found guilty beyond a reasonable doubt—all these make no sense to either layman or lawyer; and no amount of discourse about the frailty of jurors or the virtues of cross-examination can give them the appearance of rationality.

Consequently it is in the chapter on Hearsay that the Code departs most widely from the common law. It first classifies as hearsay all statements by words or other conduct, except those made in testifying at the trial at which they are offered, when evidence of the statements is offered for the truth of the matter stated. This includes a memorandum made at or about the time of the matter it purports to record which is offered by a witness who has no present memory of the matter. Such a memorandum is not usually treated as hearsay but is treated as a device for refreshing the memory of the witness. The classification includes also learned treatises, the use of which under present practice is usually discussed under the subject of examination or cross-examination of expert witnesses. Rule 603 makes admissible all hearsay declarations by an unavailable declarant which would have been admissible if the declarant were present as a witness and making them as a part of his present testimony, and all hearsay declarations by a declarant who is present and subject to cross-examination.

The first part of this Rule may seem to present greater dangers than rules now admitting hearsay. In this connection it must be remembered that the judge by Rule 8 is empowered to comment on the weight of the evidence and credibility of the witnesses, and his comment may deal with the credibility of the declarant and of the reporting witness, and may point out the fact that the jury does not have the benefit of hearing and seeing the declarant or having him subjected to cross-examination. Furthermore under Rule 403 the judge may reject the hearsay if its probative value is outweighed by the risks of undue prejudice, undue surprise or confusion of issues which its reception would carry. With these safeguards there is little or no danger of prejudicially improper use of hearsay. It must also be borne in mind that the hampering of investigation by the common law rules of procedure and of evidence has become so irksome to litigants and legislators that greater and greater resort is being made to tribunals authorized or required to disregard them. In almost every enactment setting up administrative tribunals to do work which in former times would normally have been done by the courts, the admissibility of all hearsay is expressly or impliedly authorized. And to assert that these tribunals are better equipped to evaluate hearsay than is a jury supervised by a judge, or a judge sitting in a non-jury or jury-waived case is simply to disregard the facts. Lord Coleridge's assumption that a jury should not be permitted to hear relevant matter simply because it was of a kind which is "morally convincing" and which "reasonable beings would form their judgments and act upon," accounts for much of the nonsense found in decisions excluding hearsay. Rule 603, like the rest of the Code, treats the jurors as normal human beings, capable of evaluating relevant material in a court-room as well as in the ordinary affairs of life. There they hear, consider and evaluate hearsay, there they hear, consider and weigh the opinions of their fellows, lay and expert. In the court-room they are entitled to the expert assistance of the judge, and with that help may be trusted to act reasonably.

The second part of the Rule presents no dangers which cannot be eliminated by cross-examination, for the declarant is subject to such an examination. It eliminates the absurdity of expecting a trier of fact to treat prior contradictory or prior consistent statements of the witness as affecting only his credibility but as having no bearing on the matter asserted in them. Under Rule 403, if the increment of value which the prior consistent statement will add to the present testimony of the witness is slight, the judge may well refuse to waste time in having it heard.

The judicial decisions admit many classes of hearsay from declarants who are available as witnesses but who are not present and subject to cross examination. These the Code preserves. It also puts evidence of declarations against interests in this class, and permits the judge in his discretion to dispense with the requisite of unavailability as to former testimony, declarations of family history, and recitals in dispositive or constitutive documents. It otherwise expands the generally accepted doctrines in a few instances. The following should be noted:

1. Rule 608 makes admissible a declaration by an agent concerning a matter within the scope of his agency made before the termination of the agency, even though the agent was not authorized to make the declaration.

It also makes declarations of one co-conspirator concerning the conspiracy admissible against his fellow conspirators if made while the conspiracy was on, even though not made in furtherance of the conspiracy.

It further adopts the doctrine of some cases and statutes making admissible evidence of a declaration of a declarant tending to show declarant's liability for conduct for which the party against whom the evidence is offered is vicariously responsible.

2. Declarations against interest include declarations of matters contrary to pecuniary or proprietary interest, of matters which would subject the declarant to civil or criminal liability, and

of matters which create a risk of subjecting him to the hatred, ridicule or social disapproval of the community.

3. Vicarious admissions by joint-owners, joint-obligors, and predecessors in interest are admissible only in so far as they are declarations against interest. This provision puts this whole subject on a rational basis.

4. Entries in the regular course of business are treated as in the more modern statutes, but a preliminary finding by the judge that the offered entries were made in such regular course is required. Furthermore an express provision makes absence of a regular entry evidence of the non-occurrence of the matter which, had it happened, would have been noted in such an entry.

5. Written statements by public officials and entries in public records by *ad hoc* officials are made generally admissible in the manner now commonly provided for by statute in the case of entries in records of vital statistics. The method of proving the content of an official record provided in Federal Rule 44 is adopted.

6. Judgments of conviction are made admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment.

7. Reputation offered to prove a person's character includes reputation in a group with which he habitually associates in his work or business or otherwise.

8. Statements in learned treatises are admissible to prove the truth of the matter stated, where the writer is recognized in his profession or calling as an expert in the subject.

H—Authentication and Content of Writings

As to authentication, the Code accepts the common law. As to proof of content, as heretofore stated, Rule 702 disregards the numerous rules of thumb with reference to excuses for failure to produce an original writing and as to their applicability to so-called collateral documents. It substitutes a general rule to be applied to the circumstances of each case by the judge.

It also makes clear what is obscurely implied in the cases, namely, that if what the judge finds to be the original writing is produced and introduced in evidence, there is nothing to prevent a party from introducing secondary evidence of what he claims to have been the original. The only showing he must make is that the paper which he claims to have been the original has become unavailable without his culpable neglect or wrongdoing, or that what the judge finds to be that original has been introduced in evidence.

Rule 703 makes clear the distinction between the procedural and the substantive requirements for the proof of an attested document. It puts all attested documents in the same class for procedural purposes, and provides that the execution of such a document may be proved in the same way as the execution of an unattested document, unless a statute requires attestation and in addition expressly requires that the attesting witnesses be called. This is a practicable, workable rule. If the purpose of the legislature in requiring attestation is not only to insist upon formalities to ensure solemnity in execution and to disclose the identity of the solemnizing witnesses but also to insist upon the witnesses as media of proof wherever practicable, the statute can be so drawn.

I—Presumptions

1. Meaning of Presumption

Courts and textwriters use the word, presumption, loosely and with various meanings. In all cases they are describing a legally recognized connection between two situations each consisting of a fact or group of facts. Whether the presumption is the legal process by which the result is reached, or the term by which the rule stating the result is designated, or just what part of the process, or result, or rule it does indicate is the subject of much confusing discussion the utility of which it is often difficult to discover. It is therefore advisable to talk specifically with reference to the two situations. For convenience, let the first situation be called the basic fact and the other, the presumed fact. The word, presumption, is used in connection with each of the following situations:

a. When the basic fact is established, the existence of the presumed fact must, for the purpose in hand, be permanently and unconditionally assumed. This obviously means that the basic fact is legally the equivalent of the presumed fact, and that no one will be allowed to assert the contrary. Here the courts and legislatures frequently use the phrase, "irrefutable presumption of law," or "conclusive presumption of law."

b. When the existence of the basic fact is established, the existence of the presumed fact may be inferred by the application of the rules of logic. This seems to mean that the segment of human experience with which the court is familiar convinces the court that when the basic fact exists there is a reasonable probability that the presumed fact also exists. In such a situation the courts speak in terms of justifiable inference or presumption of fact.

c. When the existence of the basic fact is established, the trier of fact is permitted to find the existence of the presumed fact, although the inference of the existence of the presumed fact from the existence of the basic fact would not, in the opinion of the court, be possible if the rules of logic were applied. This may mean that the segment of human experience with which the court is familiar convinces the court that, given the basic fact only, there is no reasonable probability that the presumed fact also exists, but some peculiarity in the situation makes it sound procedural policy in our system of litigation to permit the trier of fact to disregard the rules of logic. Thus, according to some writers, the doctrine, *res ipsa loquitur*, authorizes the trier to find negligence of the defendant from facts which would not ordinarily justify the finding because in such a situation the defendant has peculiar knowledge of or peculiar means of access to, the facts which tend to show negligence or due care. Again, a legislature may declare the basic fact to be evidence sufficient to justify a jury in finding the presumed fact, although previous judicial decisions have declared such evidence insufficient. This may mean that the legislature has believed that reasons of policy, such as comparative advantages of access to means of proof or considerations of fairness or convenience, require a departure from the rules of logic; or it may mean that the segment of human experience with which the legislature is familiar is broader than or different from that with which the court is familiar, and makes such a finding appear to be a reasonable deduction from the basic fact. Thus, where a court has previously held that the possession of intoxicating liquor furnished no basis for an inference of its illegal acquisition, the legislature in denouncing acquisition except under designated conditions may provide that possession shall be sufficient evidence to justify a jury in finding acquisition in a prohibited manner. In these situations the language of justifiable inference or presumption of fact is sometimes used; but however described, the result is that the establishment in an action of a basic fact which the courts would not ordinarily permit to be used as the basis of an inference of the existence of the presumed fact will support a finding that the presumed fact exists; and where in a trial by jury evidence of the basic fact is the only evidence of the existence of the presumed fact, the question of its existence or non-existence is for the jury.

d. When the basic fact is established, the existence of the presumed fact must be assumed unless and until certain specified conditions are fulfilled. What those conditions are is the subject of conflicting decisions. In this situation the courts speak of a compelled inference or of a presumption of law. The great

Thayer insisted that the term "presumption" should be employed only in this sense, and Wigmore agrees. Most modern judges are accepting this view, and the Code of Evidence adopts it.

2. Reasons for Judicial Creation of Presumptions

When a court uses the term presumption to express the idea that the presumed fact may be logically deduced from the basic fact, it is obviously doing no more than applying what it conceives to be ordinary rules of reasoning, and it does not conceive itself to be creating a rule of law or applying a previously created rule of law, either procedural or substantive. When a court declares the basic fact to be for all legal purposes the equivalent of the presumed fact and expresses itself in terms of irrebuttable or conclusive presumption, it is either creating a rule of substantive law or stating a previously created rule of substantive law. When it says that adverse possession of a parcel of realty for twenty years raises a conclusive presumption of a grant to the possessor, it is saying that twenty years' adverse possession is the equivalent of a grant from the owner, which is merely another way of saying that as a matter of substantive law such adverse possession creates a title to the parcel in the possessor. When it creates or preserves such a rule, it does so on the same sort of ground which causes a court to create or preserve any rule of the substantive common law.

When a court permits a jury to find the existence of the presumed fact where the basic fact is established but would not in the court's opinion logically support such a finding, it is creating or applying a rule of law regulating the allocation of functions between the judge, in his capacity as judge, and the jury or other trier of fact, and permitting the trier of fact to give an unusual, if not an arbitrary, evidential value to the basic fact. This may be due to the court's conviction that peculiar means of ascertaining and demonstrating the facts tending to show the non-existence of the presumed fact are in the hands of the party asserting its non-existence, or that other reasons of fairness and convenience justify giving this extraordinary effect to the basic fact in our adversary system of litigation.

There are myriads of situations in which the courts declare that the establishment of the basic fact requires the assumption of the existence of the presumed fact unless and until certain conditions are fulfilled. The reasons which lead the courts to make such declarations originally or to recognize their continued validity are various and of varied weight:

a. Some presumptions are created to expedite the trial by making unnecessary the introduction of evidence upon issues raised by the pleadings which are likely not to be seriously litigated. Thus, the courts which put upon the prosecution the burden of persuading the jury of defendant's sanity beyond a reasonable doubt give the prosecution the benefit of a presumption of defendant's sanity. This is done to avoid the waste of time, money and effort required to present and hear evidence of defendant's sanity when defendant may desire to introduce no evidence of his insanity or may be unable to produce sufficient evidence to make the issue of sanity one for the jury.

b. In some instances the courts have created a presumption in order to avoid a procedural impasse where evidence of the existence or non-existence of the presumed fact is lacking. It is now generally held that unexplained absence for seven years and lack of news of the absentee by those who would normally have heard from him were he alive raises a presumption of his death. In most jurisdictions, however, there is no presumption as to the time of his death, and this must be established by evidence. The result is, as Field, Circuit Justice, said in Montgomery v. Beavans, 1 Sawy. 653, 17 Fed. Cas. 628, 633 (U.S.C.C. Cal. 1871): "In numerous cases such proof can never be made, and property must often remain undistributed, or be distributed among contestants not according to any settled principle, but according as one or the other happens to be the moving party in court."[5] Consequently some courts create a presumption of life for seven years which is replaced immediately thereafter by a presumption of death, and Mr. Justice Field believed this a satisfactory solution of the problem.

c. The reason for the existence of a procedural impasse is ordinarily the impossibility of securing legally competent evidence as to the existence or non-existence of an essential fact. At times the impasse may be avoided by the allocation of the burden of proof, which, as usually used by the courts, includes the burden of coming forward with evidence. Even so, the device of presumptions may be resorted to in order to provide a uniform rule where no evidence is available. Thus, where the resolution of an issue depends on which of two persons who died in a common disaster survived the other, the civil law created a set of presumptions, and some American legislatures have done likewise. Furthermore, such difficulty in securing evidence is sometimes a powerful factor in causing the courts to create a presumption in situations where other pertinent considerations work to the same end. This is exemplified in the common law rule that a long continued exercise of what would be a right if properly originated raises a presumption of a legally created right.

d. Some presumptions are given birth and continued recognition because there is a preponderance of probability that where the basic fact is found the presumed fact also exists. Indeed, Mr. Justice Holmes in Greer v. United States, 245 U. S. 559, 561 S. Ct. 209 (1918), said that a presumption of fact ordinarily means "that common experience shows the fact to be so generally true that courts may notice the truth." Trial convenience will be served if the trier of fact is required to assume the usual in the absence of evidence which makes the unusual reasonably probable.

e. Another group of presumptions owe their origin and persistence to the judicial conviction that the party who has peculiar means of access to the evidence, or peculiar knowledge, as to the existence or non-existence of the presumed fact should bear at least the burden of producing relevant evidence thereof sufficient to justify a finding in his favor, if not the burden of persuasion. For example, at common law, where freight is delivered in good order to an initial carrier and is delivered in bad order to the consignee by the terminal carrier, although it may have been transported over the lines of several connecting carriers, there is a presumption that the damage was done by the terminal carrier. As between the carriers and the consignee, the last carrier has peculiar means of access to the evidence of the facts.

f. Where in the opinion of the court the existence of the basic fact makes socially desirable the legal results which will follow if the presumed fact also exists, the accomplishment of the desired end may be facilitated by the creation of a presumption. Thus in order to make effective the considered opinion of the courts that one who has dealt with realty for a long period of time as the owner thereof should be secure in his possession or user and might be treated as owner by others, the courts created a presumption that such a possession or user gave rise to the presumption of a lost grant. That considerations of public policy were chiefly responsible for this presump-

5. See In re Rhodes: Rhodes v. Rhodes, 36 Ch. Div. 586 (Supreme Court of Judicature of England, Chancery Division, 1887), where North, J., advised the parties to settle; In Re Aldersey (1905) 2 Ch. 181, where the contest was between mother and her children over the income from a trust estate during the first seven years after the disappearance of the husband, and the court, after refusing to presume the husband alive for seven years, presumed that he died soon after his disappearance as "the best way of cutting a knot which is incapable of being untied."

tion is shown by its evolution from a justifiable inference through a presumption to a positive rule of substantive law by which adverse possession or user for the prescribed period creates a legal title.

g. Finally many presumptions rest upon a combination of two or more of the forgoing considerations. Of these the presumption that a child born to a married woman during wedlock is the legitimate child of the husband, is perhaps the strongest example. It is supported by a heavy preponderance of probability; to produce legally competent and convincing evidence of the paternity of a child born to a married woman was, at the time when the presumption was given its greatest effect, almost impossible and is still extraordinarily difficult; and weighty considerations of social policy, legal and non-legal, make for the result expressed in the presumption in any society in which the family is the fundamental unit, the institution by which the devolution of property is determined, and as to the intimate aspects of which accepted notions of decency and propriety have long demanded a discreet secrecy.

3. When Presumption Arises

The Code agrees with all the decisions that a presumption does not become operative in an action until the basic fact has, for the purposes of the action, been established. It may be established by the pleadings, by stipulation of the parties, by judicial notice, by evidence which compels a finding of the basic fact or by a finding of the basic fact from the evidence.

4. Presumption of Legitimacy

The Code treats the presumption of legitimacy of a child born in wedlock as in a class by itself; Rule 903 provides that when it is established that a child was born to a woman while she was the lawful wife of a man, the party asserting the illegitimacy of the child has both the burden of producing evidence and the burden of persuading the trier of fact beyond reasonable doubt that the husband was not the father of the child. This Rule has the support of many cases and was approved by the Institute at the Annual Meeting in 1940. Because strong reasons of policy require that a child born in wedlock be treated as legitimate for all legal purposes, the clearest proof of illegitimacy is required.

5. Procedural Effect of Presumptions

Upon the question of the procedural effect of the establishment of the basic fact of a presumption the authorities are in a state of hopeless confusion. Upon one point only they are in complete accord, namely, that when once the basic fact is established in an action, it continues to have throughout the action at least that probative value which it would have had, had no presumption ever become operative in the action. As noted earlier, the Code concerns itself only with the procedural effect of a presumption when that word is used to indicate that the establishment of the basic fact in an action requires the trier of fact to assume the existence of the presumed fact unless and until certain conditions are fulfilled. If and when those conditions occur, the common law and the Code agree that the basic fact is to be given at least its rational effect as evidence of the presumed fact. The point upon which the authorities disagree is whether after the fulfillment of the condition, the establishment of the basic fact has any other procedural effect. As to this the judicial opinions reveal the following views:

a. The existence of the presumed fact must be assumed unless and until evidence has been introduced which would justify a jury in finding the non-existence of the presumed fact. When once such evidence has been introduced, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action; indeed, as if no such concept as a presumption had ever been known to the courts. Whether the judge or the jury believes or disbelieves the opposing evidence thus introduced is entirely immaterial. In other words, the sole effect of the presumption is to cause the establishment of the basic fact to put upon the party asserting the non-existence of the presumed fact the risk of the non-introduction of evidence which would support a finding of its non-existence. This may be called the pure Thayerian rule, for if he did not invent it, he first clearly expounded it.

b. The existence of the presumed fact must be assumed unless and until there has been introduced, and the jury has determined not to disbelieve, evidence which would justify a jury in finding the non-existence of the presumed fact. This view, though stated in several cases, is expressly accepted in but one jurisdiction at present.

c. The existence of the presumed fact must be assumed unless and until there has been introduced, and the jury has decided to believe, evidence which would justify a jury in finding the non-existence of the presumed fact. This view has no present adherents in the courts.

d. The existence of the presumed fact must be assumed unless and until evidence has been introduced which would justify a jury in finding the non-existence of the presumed fact. When such evidence has been introduced, the existence or non-existence of the presumed fact is a question for the jury unless and until "substantial evidence" of the non-existence of the presumed fact has been introduced. When such substantial evidence has been introduced, the existence or non-existence of the presumed fact is to be decided as if no presumption had ever been operative in the action. Thus if the basic fact, by itself or in connection with other evidence, would rationally support a finding of the presumed fact, the existence or non-existence of the presumed fact is a question for the jury; if the basic fact is the only evidence of the presumed fact and would not rationally justify a finding of the presumed fact, the judge directs the jury to find the non-existence of the presumed fact. Unfortunately the cases which support this rule do not define substantial evidence: it is certainly more than enough to justify a finding; sometimes it seems to be such evidence as would ordinarily require a directed verdict. In the State of Washington, a variant of this view substitutes for "substantial evidence," evidence from one or more disinterested witnesses.

e. The existence of the presumed fact must be assumed unless and until the evidence of its non-existence convinces the jury that its non-existence is at least as probable as its existence. This is sometimes expressed as requiring evidence which balances the presumption.

f. When the presumption is created because the opponent has peculiar knowledge or peculiar means of securing knowledge of the data from which the existence or non-existence of the presumed fact is to be inferred, its existence must be assumed unless and until the evidence convinces the jury of the existence of facts from which a jury might reasonably infer the non-existence of the presumed fact. This view is fully set forth in O'Dea v. Amodes, 118 Conn. 581 (1934).

g. The existence of the presumed fact must be assumed unless and until the jury finds that the non-existence of the presumed fact is more probable than its existence. In other words the presumption puts upon the party alleging the non-existence of the presumed fact both the burden of producing evidence and the burden of persuasion of its non-existence. This is sometimes called the Pennsylvania rule.

h. The presumption as such is said to operate as evidence of the presumed fact, and this effect is given to it regardless of evidence of the non-existence of the presumed fact. It is exceedingly difficult to understand the concept thus expressed. Its effect is often to make the existence of the presumed fact a question for the jury when otherwise a verdict of its non-existence would be directed.

(To be continued)

CARTOON BY DAUMIER

[1808-1879]

Chez Aubert & Cie Pl. de la Bourse 29. Imp. d'Aubert & Cie

From an original owned by Urban A. Lavery

– Perdu, monsieur... perdu sur tous les points..... et vous me disiez encore ce matin que ma cause était excellente!...

– Parbleu... je suis encore tout prêt à le soutenir si vous voulez en appeler.... mais je vous préviens qu'en Cour royale je ne le soutiens pas à moins de cent écus!....

Free Translation

"Lost, sir! Lost on all points—why you told me just this morning that the case was perfect!"
"Indeed, yes! But I am still ready to sustain the case on Appeal. However, to do that I must have a fee of a hundred crowns."

THE ANNUAL DINNER

THE Annual Dinner of the American Bar Association was held in the Riley Room of the Claypool Hotel on Thursday evening, October second, President Lashly presiding. The attractive room, a memorial to Indiana's James Whitcomb Riley, inscribed with quotations from the Hoosier poet, created a colorful setting; the guests overflowed the long room into the mezzanine where tables had been set up to accommodate those who could not find places inside.

President Lashly explained to the audience that the conferring of the Association's Gold Medal for distinguished service to the cause of jurisprudence had been made a feature of the 1940 Banquet at Philadelphia and that the presentation was so appropriate for the after-dinner program, that it had been decided to follow it this year. He introduced Hon. Robert T. McCracken of the Philadelphia Bar as the spokesman on this occasion and spoke appreciatively of his character, his distinguished accomplishments and his high standing in the profession.

Mr. McCracken said in beginning his remarks:

> Away back in 1928, when Adolph Hitler was only an ex-corporal and before the Supreme Court of the United States had acquired the title of "The nine old men," an appellation which Mr. Justice Jackson so magnificently belies, when the American Bar Association was celebrating its fiftieth birthday, there was established the Association's award for Distinguished Service to American Jurisprudence.

He stated that the Medal had been conferred upon an illustrious group of men and that by the selection of the Board of Governors it was now to be presented to one who would take his place easily and with instant familiarity in that shining company. He then stated that it had been awarded to George Wharton Pepper of Philadelphia and the audience rose and applauded. Mr. McCracken continued with reference to Senator Pepper as a civic leader, a brilliant statesman, a powerful advocate, a wise counselor, a devoted churchman and a loyal friend.

Going back to Mr. Pepper's undergraduate days, he referred to an essay in which the student had analyzed and dissented from the doctrine of *Swift v. Tyson* and stated that when Mr. Justice Brandeis delivered the opinion in *Erie v. Tompkins* he cited in a footnote to the opinion that half-century-old essay by an undergraduate in a Pennsylvania law school. Reference was made to the Pepper and Lewis digest of Pennsylvania opinions, to seventeen years as professor of law at the University of Pennsylvania, to thirty years' service as a trustee of that institution, and to the series of Lyman Beecher lectures at Yale in 1915 and the William H. White lectures at the University of Virginia in 1931.

Passing from the field of interpreting and imparting the law, Mr. McCracken spoke of Senator Pepper's excursions into its creation. Among these he listed his services as Senator of the United States, representing the Commonwealth of Pennsylvania, from 1922 to 1927, during which period he devoted himself to the work of a Senate committee which made possible the establishment of the United States Code Annotated.

Reference was also made to his devotion to the work of the American Law Institute from the date of its institution to his election in 1936 as its president. In 1936 he was appointed by the Supreme Court as a member of the Court's Advisory Committee on the Federal Rules of Civil Procedure. In closing he said:

> Senator Pepper, in the name and on behalf of that great fraternity which you have honored for over a half a century, and to whose lofty aims and high ascent you have contributed so significantly, I present this medal, representing as it does the most perfect tribute of respect, admiration, and affection which we are able to pay.

The audience again arose and applauded, as Senator Pepper stepped forward to acknowledge the presentation of the medal. His eloquent and moving response is printed in full on the opposite page.

President Lashly then introduced Sir Norman Birkett, of whom Senator Pepper had just said,

"Here is a man who has come to us as the foremost of the English bar, a man who has shown himself more than adequate in every demand that has been made upon him by his profession and his country. Upon him high accolade might worthily be bestowed. He came on a difficult and a delicate mission, and I am not mistaken, I am sure, when I sense that Sir Norman has endeared himself to every one of us and perhaps he will permit me to express it by saying that this is a second and bloodless Norman Conquest."

Sir Norman, who had stirred the Assembly audience on the previous evening with his eloquent evocation of the traditions and heritage which bind the peoples of England and the United States and for which Britain is fighting, now moved his listeners to laughter by his gay humor. The applause indicated that his audience shared his feelings when he said,

"I have nothing more to add to what I tried to say last night of the sense of honor and pride and privilege which I have experienced in being invited to this great Association, an honor which I shall remember all my life and shall rejoice to think that I came as a stranger among you, but now, with my new honor upon me, I come to you as one of yourselves."

Finally, to close a successful evening, President Lashly introduced the new Associate Justice of the Supreme Court, Robert H. Jackson, whose address on "The Challenge of International Lawlessness" is printed in full elsewhere in this issue.

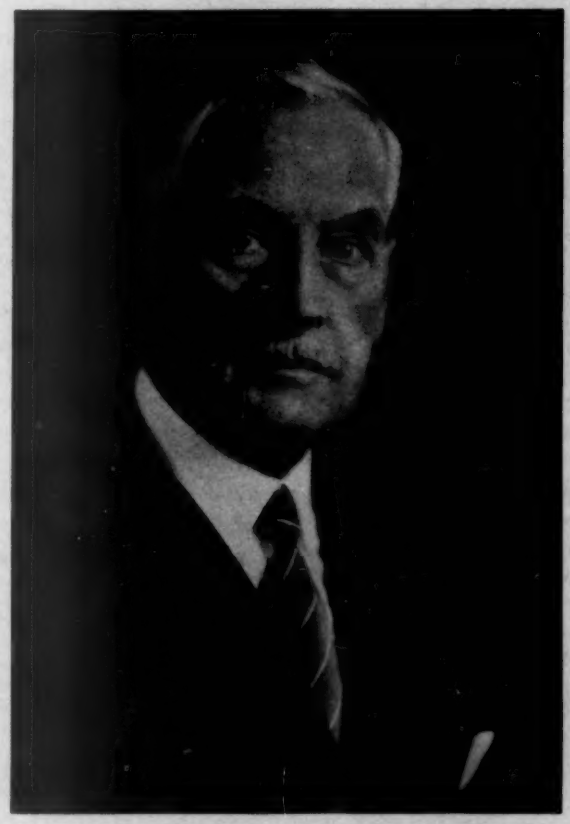
RESPONSE BY SENATOR PEPPER

UNDER ordinary conditions I have always hesitated to echo Bobby Burn's prayer:

> "O wad some Power the giftie gie us
> To see oursels as ithers see us!"

The truth is that a moderate amount of self-satisfaction gives zest to life. When a man is happy in the belief that he is an important member of his community why spoil his life by telling him the real verdict of the neighborhood? I recall a case in which a pastor from a distance was called in suddenly to officiate at the funeral of a man he had never known. He delivered a glowing eulogy of the deceased and then was conveyed to the place of interment by the local undertaker. "Now that I've said my say" said the minister "I'd like to know what sort of a man the deceased really was." After a moment's thought the undertaker, with his thumb pointed back to the hearse that was following, said "*That* is the loss of one Democratic vote." How fortunate for the dead statesman that this was a post-mortem verdict!

On the other hand I'm all for Bobby Burns when the "ithers" are indulgent comrades in this happy profession of ours and when their spokesman is such a well-beloved friend as Bob McCracken. The way in which we lawyers stand by one another has sometimes been attributed to the fact that dog won't eat dog. I prefer to believe that it is because our trained eyes can discern in one another merits to which the layman is blind. On this occasion you have discovered in me something of which I myself was profoundly ignorant. Bob McCracken gives me the astounding news that I deserve accolade for services rendered to American Jurisprudence.



Hon. George Wharton Pepper

In the first flush of elation over this news I thought that this discovery might justify me in describing myself as a *jurist*. It would be a grand thing to be born a layman, to live a lawyer and to die a jurist. I know there are cynics who define a jurist as a man who has some familiarity with the laws of all countries except his own. I, however, prefer to think of him as one whom the Bench regards as almost good enough to be a judge; whom teachers of law recognize as almost wise enough to be a professor; and whom fellow practitioners would gladly elevate to the bench or immure in a law faculty in order to eliminate him from the forum.

On reflection, however, I decided that this overwhelming award does not necessarily imply that I in my own proper person am a jurist. It is merely a finding that I have rendered services to jurisprudence—and of course one may well be a ring-master without qualifying for the flying trapeze. Indeed I am inclined to think that this ring-master simile is in my case most appropriate. I am sure that this award could never have been made were I not President of the American Law Institute—and I am painfully aware that in that capacity my service has been merely to see that the animals are fed and that they do their several acts with a minimum of mutual distrust. The real juristic work of the Institute is done by our all-wise Director, William Draper Lewis, by the many learned Reporters and Advisers who really know their stuff and by members of our Council—which would still be an highly efficient body if it consisted of only one of its many able members—Charles McH. Howard of Baltimore. I should like, by the way, to pay my tribute of admiration to Mr. Howard as possessing the greatest reservoir of accurate legal knowledge of any man with whom I have come into contact.

For what I have lacked in scholarship I may perhaps have in some degree made up by my unflagging enthusiasm for my calling and by a life of unremitting effort in the field of law. I came to the Bar in Philadelphia more than fifty-two years ago. For the first twenty-one years thereafter I lived the dual life of a practitioner and of a teacher of law. When compelled to choose one of these careers I decided, although with many misgivings, to give my whole time to active practise and this resolve I adhered to when an opportunity came to go upon the Federal Bench. But the teaching of law gave me an appreciation of legal scholarship and of the enormously important part which

a wise teacher may have in the evolution of our legal system. It fitted me, I think, to cooperate acceptably with the law school teachers with whom I have since worked both on the Federal Advisory Committee and in the American Law Institute. The Bench and the Bar will do well to recognize that no coherent body of jurisprudence can be evolved unless during the process it passes through the schools.

My work at the Bar was to some extent interrupted by serving a term in the Senate of the United States. While in a single term a senator can seldom learn to be of much use, he has at least a great opportunity to gain a realistic conception of government in action and to touch shoulders with able men from all over the country. Perhaps I did make some contribution to Jurisprudence while in the Senate by taking the laboring oar in the preparation of the subsequently published United States Code.

The professional opportunities which have come to me at the Bar have been many and great and, all things considered, far beyond my deserts. And now, as the shadows lengthen, comes this great honor which for me brings light at eventide. I do not trust myself to speak much of my feelings on this occasion: they might easily get the better of me if I did. When I compare my professional record with that of some other men, let us say, with the record of our well-beloved guest Sir Norman Birkett, I at once become suitably humble. As England's foremost barrister he came here upon a difficult and delicate mission. By an unusual combination of charm and talent Sir Norman has won all hearts—in what I may be pardoned for calling a second and bloodless Norman conquest. The highest of decorations would be well-bestowed upon him. Nor must I allow myself to enumerate the really worthy men who have received this award in former years. If I did this I should certainly feel like Gulliver among the Brobdingnags. But I may at least thank you from the bottom of my heart and this, Mr. President, I here and now do. And perhaps I may stifle my sense of unworthiness with the hope that what I lack in great achievement I make up in whole-hearted appreciation.

THE EIGHTH CHIEF JUSTICE

THIS month we show a portrait of Chief Justice Melville W. Fuller (1833-1910), who took his seat on the bench at the opening of the term in October, 1888, and served till his death twenty-two years later. The period covered (as Mr. Charles Warren says) "is too recent and too clearly within the view of living men to warrant detailed description, nor can an adequate account be written until the lapse of time shall afford a true, historical perspective."

President Cleveland desired an Illinois man, and Fuller was the leader of the Illinois bar. He was a strong Jeffersonian Democrat, standing firmly for State's rights. He seems never to have been greatly stirred up on the slavery question. On social and economic questions he came to be, or perhaps always was, a conservative. He wrote a large number of opinions, including some in famous cases: the opinion on rehearing, which held the Income Tax Law of 1894 unconstitutional, the Sugar Trust case, the Original Package case (liquor in interstate commerce), and the Danbury Hatters case. He dissented often; perhaps his best-known dissents were in the "manifest destiny" cases following the break-up of the Spanish colonial empire in 1898. He was always very loyal to his old college, Bowdoin; and he had literary tastes, admiring however Akenside and Mrs. Barbauld and poets of that rank, from whom he would quote freely. On his last day on the bench, April 30, 1910, a memorial to Justice Brewer was presented. The Chief Justice spoke with emotion:

> During the years of my occupancy of a seat upon this Bench it has been my sad duty to accept for the court tributes of the Bar in memory of many members of this tribunal who have passed to their reward. As our brother Brewer joins the great procession, there pass before me the forms of Matthews and Miller, of Field and Bradley and Lamar and Blatchford, of Jackson and Gray and of Peckham, whose works follow them now that they rest from their labors. They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike. They differed as "one star differeth from another star in glory." Their names will remain illustrious in the annals of jurisprudence. And now we are called on to deplore the departure of one of the most lovable of them all.

When Chief Justice Fuller died, Justice Holmes, who served with him for eight years, wrote this precious letter:

> The services at Sorrento moved me through and through. It was a beautiful day, and there was no false note. The coffin, spread with a coverlet of flowers, was put on a buckboard to go from the house to the church; the birds were singing; the clergyman, a fine fellow whom I dare say you know, read extremely well; a little choir of four young men sang touchingly. The church, built by Richardson, was the right thing for the place. It is rare indeed for me to find everything so to conspire with the natural feeling of the moment . . .
>
> I think the public will not realize what a great man it has lost. Of course, the position of the Chief Justice differs from that of the other judges only on the administrative side; but on that I think he was extraordinary. He had the business of the court at his fingers' ends; he was perfectly courageous, prompt, decided. He turned off the matters that daily call for action easily, swiftly, with the least possible friction, with imperturbable good-humor, and with a humor that relieved any tension with a laugh. . . . Certainly to me, the loss will be great.

The funeral services referred to by Holmes were at the town in Maine (Fuller's native State), where he always spent his summers, and where his death took place. Final interment was in Chicago.

NOTE: This suggests the correction of an error in our note on Chief Justice Waite in our last issue (October), in which we relied on a statement, in a recent authoritative little book, that "after all, Waite came from the Connecticut valley, and lies buried in the Old Lyme cemetery." There is, indeed, a Chief Justice Waite buried at Old Lyme, but it is our Chief Justice's father, Henry Matson Waite, Chief Justice of the Supreme Court of Connecticut. Morrison R. Waite, Chief Justice of the United States, is buried at Toledo, Ohio, his home city.

BOARD OF GOVERNORS MEETING, INDIANAPOLIS

EARLY arrivals in Indianapolis for the annual meeting of the Association were the members of the Board of Governors. Four sessions on September 26 and 27 and two on September 30 and October 1 were required to dispose of the many matters on the Board's agenda. Since the constitution of the Association requires that reports of Sections and Committees shall be transmitted to the House of Delegates through the Board of Governors, those reports constituted the principal matter of business during the six sessions. Action thereon was duly reported to the House and, any recommendations by the Board as to such reports usually are stated in the record of the proceedings of that body.

Two vacancies on the Board of Editors of the JOURNAL were filled by the Board of Governors. Thomas B. Gay of Richmond, Virginia, was elected for a term of five years to succeed Gurney E. Newlin of Los Angeles, California, whose term expired at the end of the annual meeting, and who declined re-election. Professor James Grafton Rogers of New Haven, Connecticut, was elected to serve the unexpired term of Walter P. Armstrong, who became an ex-officio member of the Board of Editors through his elevation to the Presidency of the Association.

Selection of a subject for the 1942 Ross Essay contest resulted in a choice which will no doubt attract many participants and will result in many constructive contributions to the discussion of a subject of great National interest. The 1942 subject is: "What changes in Federal legislation and administration are desirable in the field of labor relations law?"

As is customary, the new Board of Governors, composed of its newly elected members and officers of the Association, met immediately following the adjournment of the annual meeting on October 3, with Incoming President Armstrong in the chair. Plans for the new Association year are forecast in its first official business, the fixing of the time and place for the 1942 annual meeting. Detroit, Michigan, was selected and the opening session is scheduled for August 24, 1942.

Judge Edward T. Fairchild, of the Supreme Court of Wisconsin, William P. MacCracken, Jr., Washington, D. C., and Laurent K. Varnum, Grand Rapids, Michigan, were reappointed as members of the Board of Elections of the Association for the current year, Judge Fairchild being renamed as Chairman. This body, of which the Chairman must be a member of the highest Court of law of a State, supervises and conducts all nominations and elections held by mail ballot of the members of the Association.

Acting upon the direction of the House of Delegates that it fix the time and place of the midwinter meeting of the House and also of the meeting of the State Delegates, the Board selected the Edgewater Beach Hotel, Chicago, as the place of that meeting and tentatively selected the month of February, 1942, as the time. The exact date will be determined later but in ample time to permit the sixty days' notice required prior to such meeting.

The major problem before the new Board concerned the financial affairs of the Association. One of its responsibilities is the adoption of a budget for the current year. As adopted, the budget is in balance; but it was recognized that rapidly changing conditions may necessitate changes in the appropriations which have been made for carrying on the many activities of the Association. It was pointed out by the Budget Committee that it is particularly difficult at this time to make an accurate estimate of the revenues of the Association and equally difficult to determine the probable cost of carrying on its essential functions.

Consideration of the budget gave prominence to the large sum spent each year by the Association for printing and to the effect of the present national emergency upon that particular item. Attention was directed to the increasing costs of labor, paper and other materials and to the possibility that an actual shortage in the supply of paper for non-essential printing may be imminent. At the same time, it was pointed out that the ever expanding activities of the Association and its Sections and Committees present a continually increasing demand for more and more printing. These conditions, it was recognized, create an emergency which is likely to throw the carefully planned budget entirely out of balance unless steps are taken immediately to deal with the situation and to assure prudent expenditure of the Association's limited funds.

It was, therefore, determined that an Emergency Committee on Printing Costs and Publication should be set up at once to deal with the problem. This Committee is to consist of five members of the Association to be appointed by the President, is constituted for a period of one year only, and is at all times to be subject to the instructions of the Board of Governors. The existing Special Committee on Printing, Publication and Indexing was abolished.

Under the resolution creating the Emergency Committee, it is given full charge and supervision of all printing and printing expenditures by the Association and its Sections and Committees. Appropriate provision is made for prompt decision by the Board of Governors of any question or difference of opinion between the Committee and any officer, Section or Committee of the Association as to printing by sections which collect section dues to defray the cost of their printing, etc., the powers of the Emergency Committee are limited to making of recommendations as to certain specified matters. The Emergency Committee is also directed to make such investigations and report as it can of the uses which are made of the printed matter issued by the Association and its Sections

and Committees and of the usefulness of such printed matter to members of the Association and the legal profession, so that some appraisal can be made as to the results secured from the expenditure of funds for printing under the emergency conditions. This latter function of the Committee is one in which all members of the Association, whose dues are contributing to these expenditures, can be of assistance.

A number of additional administrative problems came before the Board for consideration, some of which were deferred for decision until the midwinter meeting, in order that further time for investigation and study might be available.

Olive G. Ricker was re-elected Executive Secretary of the Association and Joseph D. Stecher of the Toledo, Ohio, Bar was re-elected Assistant Secretary.

Announcement of 1942 Essay Contest

Conducted by

American Bar Association

Pursuant to terms of bequest of Judge Erskine M. Ross, Deceased

Information for Contestants

Subject to be discussed:

"What Changes in Federal Legislation and Administration are Desirable in the Field of Labor Relations Law."

Time when essay must be submitted:

On or before March 16, 1942.

Amount of prize:

Three Thousand Dollars:

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers, and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with the Executive Secretary, who will furnish further information and instructions.

1140 N. Dearborn St. **American Bar Association** Chicago, Ill.

MAY WE ASK A FAVOR OF YOU?

Will you help to extend the influence and activities of the Association by obtaining one new member?

An application form is printed below, or the headquarters office will send you separate forms, if you prefer.

A check for $6.00 ($3.00 if the applicant was originally admitted to the bar in 1936 or subsequent thereto) will cover the dues from October 1, 1941 to June 30, 1942.

AMERICAN BAR ASSOCIATION
1140 North Dearborn Street, Chicago, Illinois

Date and place of birth.....

Original admission to practice.....
State Year

Other states in which admitted to practice (if any).....

Bar Associations to which applicant belongs.....

.....

White ☐ Indian ☐ Mongolian ☐ Negro ☐

Name .....

Office Address .....
Street City State

Home Address .....
Street City State

Endorsed by .....Address .....

Check to the order of American Bar Association for $.....is attached.

THE INDIANAPOLIS MEETING

ASSEMBLY—FIRST SESSION

According to custom, the convention came together in an impressive meeting of the Assembly, Monday morning, before separating for the many-sided programs of the Sections. The welcoming address by Albert Harvey Cole, a member of the first House of Delegates, and the response by Governor Forrest C. Donnell of Missouri, were of unusual quality and of an effectiveness beyond their formal significance. The address of President Lashly was a stirring presentation of the lawyer's duty and part in National defense. President George Wharton Pepper of the American Law Institute gave an interesting account of several features of its work and plans. As usual, the offering of resolutions from the floor was a lively event; many members availed themselves of the opportunity to present their individual views for Association action after public hearing by the Resolutions Committee. Thirteen nominations were made for the election of four Assembly Delegates, with a new electoral procedure to be given trial. The first session of the Assembly set a high standard for the meeting.

THE first session was called to order in the commodious Murat Theatre, Monday morning. President Jacob M. Lashly, of St. Louis, was in the chair, but asked Chairman Thomas B. Gay of the House of Delegates to preside during the opening exercises. The main floor of the large auditorium was well filled with an expectant audience.

In formally welcoming the American Bar Association and its members, the spokesman for the Bar Associations of the City and State was the Honorable Albert Harvey Cole, of Peru, a distinguished Past President of the Indiana Bar Association, who was warmly remembered as a member of the first House of Delegates of the American Bar Association. Mr. Cole said that this privilege had been given to "a country lawyer" in order to make it clear that all of the lawyers of Indiana "unite in this hour in an expression of profound appreciation to the American Bar Association, which for the first time in its history has seen fit to honor our State with the presence of its members and distinguished guests.

"On behalf of all of them," Mr. Cole continued, "from the shifting sands which line the shores of Lake Michigan to the wooded bluffs which border on the Ohio, I want to assure you how very welcome you are. I trust that the welcome with which we greet you will be manifested not so much by mere words as by the courtesy and the hospitality which you may receive at our hands, that you may be made to feel the pride which we have in your coming here, and that as you return to your distant homes, glowing shades of October foliage will remind you of the warmth of Hoosier hospitality, and the smiling harvest of the autumn may assure you of the extent to which your presence has enriched our profession in this midwestern State."

Patriotic Keynote of Welcome

Mr. Cole gave eloquent expression to the deep feeling which was destined to become and remain the keynote of the meeting. "With these words," he declared, "I should perhaps close and say with Portia, fabled judge *pro tem.* of ancient Venice, 'Sir, you are welcome to our house. It must appear in other ways than words. Therefore, I scant this breathing courtesy.'

"At a meeting such as this, however, held in this tragic year, questions of transcendent import to our country claim your attention and call for your consideration. The program reveals that the problems of National defense pervade the discussion of various subjects and receive the consideration of many sections. May I suggest that the City and the State in which you now convene is a fitting place for a consideration of this momentous question. For more than half a century, the center of the population of the forty-eight States has been located within the confines of this commonwealth. Geographically therefore, Indiana is in a position to hear with equal clearness the voices which emanate from every fireside in the land.

"We like to feel that ours is a State typical in its various industries of the Nation of which we are a part, and that there here dwell a people representative of the warp and woof of American citizenship. Our fertile valleys and widespread plains yield nearly every product of farm and orchard that grows above the tropics. Our quarries and our mines disgorge their wealth in stone and coal. From the assembly lines of our mills and factories come almost every manufactured article which has been conceived and fashioned by the brain and hand of man.

"Into Indiana a century and a quarter ago, there flowed from New England, coming up the Mohawk and down the Wabash, adventurous sons of the early Puritan. Across the Alleghenies there came the Quakers and descendants of other early settlers of the Mid-Atlantic Coast. Down the Ohio and through Kentucky there came the stock of the Carolinians and of the Old Dominion.

Unity of Thought Needed in the Nation

"Here the tide of immigration met and mingled, leavened with a mixture of Germans and Irish, and people from still other lands. There was here welded together a homogeneous people which we believe reflects the

hopes and the ideals of every section of the Republic. And in this State and among these people, if anywhere beneath our flag, can we sense the convictions of the common people of America upon the vital questions which now call for their decision.

"In again bidding you welcome, may I humbly voice the hope that out of the free and frank discussion of this meeting, there may come to our profession a unity of thought as to our country's course in these grave and fate-filled times, and that under the leadership of bench and Bar, as dominant as ever in our history, there shall emerge and the world shall witness a Nation united in its defense of all we hold dear."

Governor Donnell Responds for the Association

Hearty applause was evoked by this address, which had a quality far more moving than any stereotyped speech of greeting. The response in behalf of the Association was appropriately made by the Honorable Forrest C. Donnell of St. Louis, lately seated as Republican Governor of Missouri after a stormy contest. Governor Donnell has been active for many years in committee work of the American Bar Association, and in his State and local Bar Associations, and he is a former law partner of President Lashly in St. Louis. Enthusiastically greeted by his many friends in the Association, Governor Donnell declared that "Indiana has given to our Nation rich and valued contributions, of which we from widely scattered communities acknowledge ourselves to be beneficiaries."

After sketching incidents of Indiana's history and material achievements, Governor Donnell made graceful acknowledgment of the State's many contributions to American literature. He referred to "The Gentleman from Indiana," by Booth Tarkington; "The House of a Thousand Candles," by Meredith Nicholson; "Fables in Slang," by George Ade; "Alice of Old Vincennes," by James Maurice Thompson; the poems of James Whitcomb Riley; and "Ben Hur" by General Lew Wallace, as "but a few of the notable instances of literary productions which have achieved for this State a lasting reputation of literary greatness." He then elicited applause by adding:

"It may not be amiss for us as members of the legal profession to express a degree of pride today in the fact that of the six authors whose names have been mentioned, two were lawyers, two were sons of lawyers, one read law, and the other worked in a law office.

"But any mention of the literary achievements of this State would not be complete without a word of tribute for the masterpiece of a great lawyer who, though born in Ohio, was graduated from Indiana University and represented this great State with honor and credit as member of the United States Senate. I refer to the immortal 'Life of John Marshall,' by the late lamented, beloved and brilliant Albert J. Beveridge."

The doughty Governor of Missouri expressed also the fervid interest of the meeting in National defense, and pointed out that "this State has almost overnight stepped forward into a position of leadership in the production of war materials and munitions. This great State has served as an example to all of us in this Nation, in resolute and immediate, undivided response to the call of National defense.

"The lawyers of our Nation are imbued with a deep and powerful spirit of patriotism with regard to their duty. In the deliberations of this convention will doubtless occur the discussion of practical means by which the legal profession may prove of maximum advantage and service in time of National emergency. No more exalted theme could command our attention than the preservation of liberty, the protection of America, and loyalty to our flag. The people, lawyers and laymen, of Indiana possess that noble devotion to these vital objectives.

"We accept the cordial welcome. We believe that throughout our sessions the generous hospitality of our Indiana brethren will be with us; and as we do return to our homes far away, we shall not forget that 'Through the sycamores the candlelights are gleaming, on the banks of the Wabash far away.' (Applause).

Annual Address of the President

When Chairman Gay introduced President Lashly for the delivery of the annual address, the assemblage arose and greeted their leader with hearty and prolonged applause, in spontaneous tribute to the zeal and friendly fairness with which he has conducted the work of the Association during his difficult year. His address, in full expression of the spirit and purposes of the Association during the National emergency, was characterized with deep earnestness of feeling and truly effective delivery. Elsewhere in this issue President Lashly's address is published in full.

Resuming the chair, President Lashly introduced "in fraternal greeting" the newly elected National Commander of the American Legion, the Honorable Lynn U. Stambaugh of Fargo, North Dakota, who was on the platform. Mr. Stambaugh is an active lawyer who has been a member of the Association since 1919 and has served on its committees. He was heartily greeted, as token of the patriotic objectives of the two organizations.

Work of the American Law Institute

After announcements by the hard-working Secretary, Harry S. Knight, of Sunbury, Pennsylvania, the Honorable George Wharton Pepper, President of the American Law Institute, made the annual statement to the members of the Assembly concerning the work of the Institute.

"Those who heretofore have spoken for the American Law Institute," said Senator Pepper, "have stated its objectives, have explained its methods of work, and have chronicled its modest achievements. By the end of 1941, we shall have published sixteen volumes of restatement in the eight most important fields of common law. We have supplemented these by annotations designed to adapt the

general statements of the restatement to the particular laws of the several States, and we have promulgated not without effect certain statutes in the important field of criminal justice.

"Let me select three points upon which to comment briefly. One of them concerns something already achieved; one of them, an activity under way; the third has to do with the future of the Institute.

Justice for Youthful Criminals

"As for what has been achieved, I select the launching of a long delayed reform in the important field of criminal justice to youth. The Institute has drafted and promulgated for the consideration of State legislatures the Youth Correction Authority Act, and this Act has met with an unexpectedly wide and hearty public response. I take it that is so because of a general recognition of the need which it is the effort of the Act to supply. Of our population above the age of fifteen, youths between fifteen and twenty-one constitute only 13 per cent, but they include about 25 per cent of our convicted robbers, they supply about 40 per cent of our convicted burglars, and about 50 per cent of our automobile thieves.

"This means that our system of penology, certainly as applies to youth, leaves much to be desired in the way of checking criminal tendencies and protecting society. The Act which has been promulgated proceeds upon the theory that the function of determining guilt or innocence, which properly belongs to the Court, is a wholly different function from that of taking charge of the convicted offender in the post-conviction period.

"The Act, of course, is merely a model. It must be adapted to local conditions and local needs. California, for instance, has so adapted it, and has enacted it and made a suitable appropriation to give it a fair trial. In Illinois, the principles of the Act have been set in motion by administrative order; and in New York, Ohio, Pennsylvania, Rhode Island, Michigan, and elsewhere, local Acts are ready for introduction at the next session of the Legislature.

"These Acts will be subjects of discussion in your several jurisdictions. I beg you to use your great influence to see to it that when they are introduced into the legislative bodies, it will be recognized that they are not partisan measures, Republican measures or Democratic measures, or what not; but that criminal justice to youth, under the conditions under which we live in this country, is a matter which far transcends in importance any partisan consideration.

The Proposed Code of Evidence

"A word about an activity that is in process, and here let me select the proposed Code of Evidence, which is being evolved under the leadership of Professor Morgan, of the Harvard Law School, as reporter, with an unusually able group of advisers, and fortunately, with Dean Wigmore as a valued consultant.

"I fancy, Mr. President, that the Act when finally promulgated will drop like a bombshell in many conservative quarters. I for one (and I have no doubt that there are other lawyers present almost as old) will have become before long accustomed to the passing of whole areas of law in which it has been our pleasure in the past to make exploration.

"As a member of the Federal Advisory Committee I was present, assenting to the obsequies of common law pleading in the Federal Courts, a subject which I once taught and about which I wrote a book. I mourned at the grave of equity procedure in the Federal Courts, and now I am ready, with dry eye, to part with the hearsay rule and many other rubrics with which we have been content to mystify the public and to puzzle the witness.

"As I understand it, there are three views about evidence. One extreme is that it should be wholly in the discretion of the trial judge, with little or no opportunity for review on appeal; another, a sort of functional approach, breaking down the whole number of human activities into their myriad parts and working out rules of relevancy applicable to each. And then there is an attempt between these extremes to find the golden mean, and that is the task upon which Professor Morgan and his capable associates are embarked, a difficult task, and yet his resourcefulness and tact and unfailing humor are equal to it, I think.

"Somehow he reminds me of that 'Down East' skipper who was being examined by some young navigators for a pilot's license, and they specified various rocks and shoals by name, and asked him if he knew where they were. The old man said, 'No, but I know damn well where they ain't!' The application of this homely method may enable Eddie Morgan to steer his tortuous channel in safety.

Unfinished Work for the Institute to Do

"Just a word about the future of the Institute. You know that the Institute has been liberally and generously financed by the Carnegie Corporation; but now that we are coming to the end of the work which we undertook with that institution to do, the question is whether there are other fields of usefulness in which our personnel and our method of approach can be of value to the public. Many wise advisers are of the opinion that this is so, that it would be a grave mistake to allow this group to disintegrate, that it would be a loss if our method of cooperative work were to disappear, and that there are many fields to the tilling of which our system and our personnel is wholly adequate.

"We have adopted a certain measure of self-support by dues and contributions; and various funds will have to be provided for the things that we contemplate, of which let me mention three. The first is the project of translating into Spanish, Portuguese, possibly, the restatements published by the Institute. This project was highly commended at the Havana Conference of the Inter-American Bar Association, and your own Section of International and Comparative Law has commended

the project. I hope it will receive favorable consideration at your hands.

"One danger I should like to guard against. It is essential, if this thing is done at all, that it should be a real translation of the whole restatement. A mere monograph is an easy thing to suggest as an adequate substitute, but it is not a substitute. A monograph, in its nature, is the work of a single man; it is never the product of really cooperative effort. The Institute is equipped to do a great task in the field of translation and annotation, with a view to cementing the cultural and social relations between this country and the nations that lie to the south of us.

Fresh Exploration of the Law of Association

"The second of the three suggested activities is the law of association which, as I use the term, includes all situations in which two or more persons unite either in the holding of property or in the pursuit of common objectives. Such a study, beginning with common holdings by various forms of tenure, would step forward to the point at which the co-owners launch their common property in business and become proprietors of that business so launched; that is, partners, where each partner has the representative right to act for his fellows and bind them.

"The study would then proceed to that form of organization in which action to bind the group can be taken only by official representatives under normal conditions, representatives elected for the purpose, which is the distinctive characteristic of the corporation. The study would include the various forms of corporate activity from the business corporation to the group form for municipal self-government, and then would proceed to take cognizance of those higher forms of organization in which the corporation is itself a unit, much as dominions find their place in an empire.

"It will not be forgotten that a distinguished authority has said that it is impossible for anybody to put his finger upon the point at which the company for trading in the East Indies became England's Indian Empire; and along the route of this fascinating development, many analogies suggest themselves—the family association, the domestic relation, which may be regular or irregular, as in the case of corporations—and interesting analogies between the consequences of irregular association in the two fields, the common law marriage in one case, and *de facto* corporations in another.

Quest of a Universal Bill of Rights

"Finally, an enterprise which perhaps is hazardous, but which I am encouraged to mention by the splendid address of your President; that is, the ascertainment of what those principles of human freedom are which are esteemed priceless by those who hold to the democratic way of life. It will not do to postpone a consideration of this subject to the moment when diplomats and the political leaders of victorious states are gathered at the council table negotiating a so-called peace treaty. In advance of that event, scarcely less dangerous than war, it is our bounden duty to see whether there may not be formulated something like a universal Bill of Rights, specifying those fundamental principles without which many of us feel that life is not worth living.

"We, of course, are common law lawyers, trained under the English tradition and under a particular constitutional system. We must share this responsibility with those whose background is European history and the civil law. The Institute will seek the cooperation of such men, because obviously a Bill of Rights, to be really universal, must commend itself to all men everywhere who love freedom and who place high value upon the dignity of the human soul.

Unity of the Profession Has Been Fostered

"I do not know what your appraisement is of the modest achievements of the Institute in respects that can be catalogued, but I do think that you will agree that we have done a good job in promoting wholesome and effective cooperation between the three estates of the profession—the bench, the Bar, and the schools.

"As I look back over much more than fifty years of active practice, I think I discern within the profession a greater measure of unity than at any time in the past. Time was when bench and Bar, not always with the most profound respect for one another, used to take pleasure in making wisecracks and directing criticisms at the professor in the law school, and the professor answered by ill-concealed contempt for both the critics.

"This has disappeared to a great extent, and each of these groups is willing to recognize the merit of the other and to appraise the essential contribution which each must make to the progress of law. For this happy result I claim some measure of credit for the American Law Institute. From long-range sniping, constant and intimate personal contact has come about, and I think, Mr. President, that we have demonstrated how large a measure of unity may be attained when men of good will find themselves working shoulder to shoulder in a work that is really worth while."

Senator Pepper's trenchant and forward-looking account of the public objectives of the work which the Institute hopes to carry on was received with marked interest by the large audience constituting the Assembly.

Offering of Resolutions from the Floor

The first session of the Assembly then launched on what is usually one of its lively features, the offering of resolutions from the floor by individual members who wish to have their views heard and acted on. Resolutions so offered at the first meeting are referred to the representative Resolutions Committee for public hearing and later report to the Assembly, without reading or debate at the time of introduction. President Lashly stated the procedure.

The resolutions offered were more numerous than usual; they are quoted or summarized later in these proceedings in connection with the report and the Assembly action. Some of the resolutions were greeted with expressions of approval or disapproval at their introduction. The introducers and subject-matter of those offered from the floor were briefly as follows:

By James W. Ryan, of New York, a resolution as to repeal of the Neutrality Act.

By Joseph T. Harrington of Chicago, a resolution proposing a referendum to the Association membership as to whether they favor war without a declaration of war by the Congress, and a resolution creating a special Committee of the Association to collect evidence of overt acts by the President of the United States, with a view to impeachment.

By Otto Gresham, of Chicago, a resolution as to practice.

By Eugene Quay of Chicago, a resolution as to the rights of men under the Selective Service Act and a resolution as to the constitutional effects of the declaration of emergency.

By Murray M. Shoemaker, of Ohio, a resolution prepared by Colonel John H. Wigmore, expressing sympathy with the bar of Paris.

By Miss Dorothy Frooks, of New York, a resolution proposing a differentiation between the freedom of speech, etc., which helps preserve democratic institutions, and the so-called freedom of speech which destroys them.

By A. A. McKinley, of Chicago, a resolution as to rights of insurance policy-holders.

By Walter M. Bastian, of the District of Columbia, a resolution as to State Department Procedure in visa cases.

By James Fellers, of Oklahoma, a resolution favoring the creation of a Junior Bar Conference by the Inter-American Bar Association.

Some discussion followed, by way of explanation of the prescribed procedure as to resolutions.

Nomination of Assembly Delegates

Secretary Knight announced that, by reason of the failure of State Delegates to register as in attendance of the meeting, a vacancy in the office of State Delegate had arisen in Florida, Hawaii, Iowa (where Jesse Miller had been killed in an accident), Maryland, Puerto Rico, South Carolina (where Senator Alva Lumpkin had died), and Vermont. Members of the Association present in Indianapolis from those States met later to fill these vacancies temporarily, pending mail ballot election early in 1942.

A vacancy existed in the office of Assembly Delegate, by reason of the absence of ex-Judge John Perry Wood, of Los Angeles, who was addressing the Colorado Bar Association. Ex-Judge Crump of Los Angeles nominated last retiring President Charles A. Beardsley, of Oakland, California. There were no other nominations, and Mr. Beardsley was unanimously elected for the vacancy, on motion made by Louis S. Cohane, of Detroit.

Nominations for election as Assembly Delegate were then made, four to be chosen for a two-year term. Those nominated from the floor were, in sequence:

Lewis F. Powell, Jr., of Virginia
Arthur T. Vanderbilt, of New Jersey
Edwin M. Otterbourg, of New York
Robert Stone, of Kansas
George E. Brand, of Michigan
Nathan William MacChesney, of Illinois
Bruce W. Sanborn, of Minnesota
Harry P. Lawther, of Texas
William L. Ransom, of New York
Robert N. Somerville, of Mississippi
Carl B. Rix, of Wisconsin
Burt J. Thompson, of Iowa
Eli F. Seebirt, of Indiana

Secretary Knight explained the proposed new procedure for the election of the four Assembly Delegates on Wednesday, through all-day voting, with the use of ballot boxes and printed ballots. On a motion by Frank H. Haskell, of Maine, that the use of this method of election be approved, President Lashly ruled that the announced method had been adopted, and would be given a trial. The Assembly thereupon recessed.

ASSEMBLY—SECOND SESSION

The second session of the Assembly was inspiriting throughout, and took on the aspects of a truly historic occasion in the declaration of the foreign policy of the United States, as well as in the annals of the Association. Intensely patriotic feeling pervaded the large audience. A notable announcement of constructive work in progress was made by the Association's Committee on National Defense which asked for help. In the presence of the official representatives of Canada and many of the republics of the Americas, Secretary Frank Knox, of the Navy Department, took the occasion to deliver from the Association platform a highly important address on American sea power in relation to freedom of the seas and the protection of the Americas from foreign invasion. The distinguished Secretary received a great ovation, as did the others who followed him. A significant Symposium on Hemispheric Solidarity took place, under the auspices of the Section of International and Comparative Law. Dr. Enrique Gil, from the Argentine, gave a reasoned and long-range view of hemispheric solidarity in its relation to law and human rights. The Honorable Pierre Casgrain, Secretary of State for Canada, brought official greetings, and gave an eloquent, graphic account of the unity of races and the cooperation between the United States and Canada. Senator Tom Connally, Chairman of the Senate's Foreign Relations Committee, sustained strongly the foreign policy of the United States, and declared the basis for greater confidence and better team-work among all of the nations of the Western Hemisphere. By general acclaim, this was one of the most interesting and important sessions in the whole history of the Assembly and the Association.

WITH their interest spurred by the excellent programs of the Sections Monday afternoon and Tuesday, members of the Association thronged back to the Assembly Wednesday morning for its second session, held in the Murat Theater, President Lashly again in the chair.

After announcements, the first speaker was Edmund R. Beckwith, of New York, Chairman of the Association's hard-working Committee on National Defense, which has maintained a Washington office during the Association year, and has notably organized a Nation-wide staff of lawyers in aid of preparedness. Mr. Beckwith was heartily greeted, in appreciation of the outstanding work of the group which he formed and led.

Committee on National Defense Tells of Non-Federalized Military Forces

Chairman Beckwith spoke particularly of the state of the law as to non-federalized military forces, which he characterized as "of substantial public interest."

"It is the problem," said he, "of creating actually a complete, orderly, modern statement of the law which governs at the present time, or should govern, State guards, by which, of course, I mean the organized military forces of the States, which are not subject, so far as we know now, to being called into the Federal service. There are now some twenty-five States with Acts on their books relating to state guard forces and there are now enrolled in such State guards probably more than 100,000 men, all serving for the time being inactively, without pay, training, going off to camp, studying the problems of the staff and the command on their own time.

"I speak to you now not in any sense officially, but in the role of Judge Advocate of the New York State Guard, a force which already numbers some 17,000 men and which is organized as a body of, perhaps in constitutional terms you might say, active militia on the model of the old-style division with a major-general commanding and with the full organization of staff and line officers. When the appointment as Judge Advocate came to me, I did what I suppose any reasonably cautious lawyer would do. I put to myself promptly the ordinary questions: What are the types of opinions that are going to be asked of me? What do I need to know? and, Where are the books?

"So I got together all of the authorities on military law, on martial law, and on the general relations between the military and the civil authorities, as well as the civil population. I read them carefully, and I began to discover, to my surprise and shock, that there was not between the covers of any accessible book, or any book, any statement in any complete fashion, relating to the many hundreds of problems that will arise if we reach a situation where State troops go on active duty anywhere in this country.

"To confirm that opinion, I consulted a considerable number of men who are expert in the matter of Federal military law, only to find that in the nature of the case most of them had never given any consideration to the special problems that will arise as to State troops acting under state authority, either at the call of the Governor, upon a proclamation of martial law or limited martial law or in its absence, or upon the call for assistance of a local authority like a sheriff, or in extreme cases upon the initiative of the commanding officer himself.

New Aspects of the Law of State Militia

"The whole theory of fresh pursuit across interstate lines is new; and anyone who knows the history of the Guard, the organized or active militia, running back over a period of forty or fifty years, will remember that in the greater number of instances in which the Guard has been called upon active duty, it has been in connection with labor disturbances. More than once, sometimes most regrettably, the Guard of one State or another has been used directly as a strike-breaking agency. I don't need to tell this audience that the modification of the law in recent years has very greatly changed not only the practice as it would probably develop, but the basic control of that situation.

"So, faced with the problem which would confront the legal adviser of any military force, that he could not find any of the familiar tools of the lawyer's work, nothing remained except to create. It was my good fortune to get official sanction for the project and to be able to organize a small group of able men with some experience in military law and considerable experience in legal writing, and to have them volunteer with great enthusiasm to supply that lack.

"The organization of the work is now taking the form that it will be useful to those in command. It will also be useful to the legal adviser. It will run all the way from specific direction as to legal powers and their limitations into the forms of proclamations, of curfew orders, of orders for interference with traffic or communication, control of property demolition, and so forth. It will not only be divided into sub-sections as to the command and the law, but it will be so arranged that parts can be used to adapt it to any given state.

An Appeal for the Help of Lawyers

"There are men scattered over the country who are expert in this general field, but it is extremely hard to find them. There are men who have been teaching military law for years as a by-product, and who are listed in the catalogues of law schools as professors of this or that, but rarely of military law, and there are men who have studied special aspects of the question. We want to be sure that we procure from the bar (and we believe that we are justified in submitting this request to you because of a substantial and general public interest) the most far-reaching criticism of this work that we can.

"Our resources are such that we cannot make a broad pre-publication distribution of it, but we shall have some kind of first mimeographed completed text within a matter of two or three weeks, and I want particularly to hear from lawyers who have had experience, who have given substantial consideration to any part of the field. I want to hear from them, their names, their addresses,

and an offer to read the whole manuscript (it will run something over two hundred pages) or sections of it within their own special interest and to undertake to blue-pencil it and send it back within a reasonable time, so that we may have the assurance that we have at least attempted in good faith to create a textbook upon a subject of present and probably much greater future importance by every facility at our command and with the cooperation of the local bar."

Distinguished Guests Are Presented

At the close of Chairman Beckwith's statement, President Lashly introduced to the Assembly audience several of the distinguished lawyers from other lands: Dr. Manuel Fernandez Superveille, President of the Bar Association of Havana, Cuba; the Honorable Pierre Casgrain, Secretary of State for Canada; and Dr. Enrique Gil of the Argentine, Vice-President of the Inter-American Bar Association. He also presented John T. Vance, Chairman of the Section of International and Comparative Law, saying:

"I think no Section or department of the American Bar Association has found a more responsive chord in the current year than that of this Section. It was through its instrumentality and steady and persistent urging that the Inter-American Bar Association was formed this year, and that notable first conference of March 24 at Havana was held, when the representatives from the Bar Associations from sixteen of the twenty-one republics of the Western Hemisphere came together and reasoned in fellowship with each other."

Notable Address by Secretary Knox

At this juncture, President Lashly declared that "the most important single agency for the defense of America and for the maintenance of the institutions of democracy and the way of life Americans have learned to live and want, is the United States Navy. In a way, just now it is the greatest single instrument on earth." He then presented to the Assembly audience the Honorable Frank Knox, Secretary of the Navy of the United States, who was greeted with resounding cheers.

Secretary Knox had originally accepted an invitation extended by his friend, General Nathan William MacChesney, in behalf of the Section of Real Property, Probate and Trust Law, to come to Indianapolis to speak at one of its functions. In the development and declaration of the foreign policy of the United States in the present crisis, it was deemed advisable, by those in charge, that the Secretary of the Navy should make, on or about October first, a highly important and carefully considered statement of the American policy. Secretary Knox's Indianapolis engagement made it the opportune time and occasion for this pronouncement, which obviously warranted a larger forum than a Section meeting. Accordingly, his address was transferred to the Assembly program; and the Association provided the platform and the setting for the Secretary's significant utterance, which was broadcast throughout the Nation and in other lands, and was published in full in many of the daily newspapers. Secretary Knox held closely the attention of the large audience, which was quickly aware of the far-reaching import of his address.

Secretary Knox said first that:

"I should be derelict if I did not at the outset express to you my deep appreciation for the honor you have done me, a layman, in inviting me to come before you, and I should also be derelict in my duty as a civilian connection between the profession of the Navy and the people of the United States if I did not seize upon this magnificent opportunity to apprize you of the Navy's activities, of its promises for the future, and the manner in which it is discharging its heavy responsibility. I rejoice in this chance.

The Challenge to Government by Law

"The fundamental concept of a democracy contemplates a government of laws and not of men. That fundamental, after nearly two centuries of development, has now been challenged. Its continued acceptance and practice is imperilled by an incredible attack which has laid almost all of Europe under the heel of the totalitarians. The thing itself was so incredible that it found many, including many Americans, who refused to believe it. But more than two years of brutal, ruthless, exhausting war which has spread through three continents has sufficed to make most people believe now that the challenge is real, and that these totalitarian forces must be defeated. The defeat of the totalitarian powers has now become, through both executive and legislative act, a part of our national policy. And we are now contributing, although only a part of our share, to defeat them. Through an act of the President by recommending the enactment of the Lend-Lease Law and an act of Congress passing by an overwhelming majority of both Houses, we have determined as a part of our national policy that the Hitler-Nazi system is our enemy and must be defeated. That Naziism will be defeated I have no doubt. That we shall proceed from one measure to another measure until we have taken adequate steps to bring defeat to the legions of Hitler and his satellites in Italy and Japan, again I have no doubt. . . .

"It is my province today to talk to you as the civilian head of the American Navy. It is natural and proper that I should approach this discussion with due regard to the influence of sea power in the affairs of the world of tomorrow. There can be provided no rule of law in the world, unless the great highways of the nations, the lanes of the seven seas, are controlled by powers which are peace-minded, justice-loving, and lacking in any desire for self-aggrandizement. In the pursuit of these objectives there must be a disinterested purpose to keep the highways of the sea free from bandits. And in the pursuit of such an ideal we must not lose sight of, nor neglect, a proper and legitimate devotion to American security.

Our Safety Depends on Freedom of the Seas

"Our safety and our prosperity in the world of the future lies in a stern insistence upon the principle of the freedom of the seas, the assurance of equal opportunity for world trade; and the proviso that sea power shall not be made the instrument of selfish aggression.

"It is by no means sufficient that we take those steps necessary to clear the sea lanes of the bandits which now infest them. We must do more than that. We must do our full share, and more, to guarantee that they shall be kept clear of pirates in the future. . . .

"You may say, what business is it of ours to police the seven seas? Why should we provide both the leadership and the major force to insure against another world war? My answer is history-made. Twice we have learned from bitter experience that no matter how great our reluctance to participate, the world has now grown so small, so interrelated, so interdependent, that, try as we will, we can not escape. . . . To put it bluntly, we must join our force, our power to that of Great Britain, another great peace-loving nation, to stop new aggression, which might lead to a world disturbance, at its very beginnings. . . .

"Today, in our own domestic affairs, the vast majority of our laws are obeyed. The overwhelming majority of legal processes are executed without the application of force, but it is important to remember that the force to compel observance always exists, and everybody knows it. Proceeding upon that basis, we must produce and give effect to a system of international law by force if need be until world opinion the world over, like domestic opinion in our domestic affairs, recognizes the existence of that force and submits to a rule of law. . . .

Broad Aspects of Sea Power

"Since the promotion of international justice and law is vital to our own security we must thoroughly understand that our national security has its beginnings, and is founded on, control of the seas. When I employ the term "sea power" in this discussion I wish all of you to understand that I refer not only to the power exercised by surface ships, or ships that operate beneath the surface, but likewise to ships of the air. Now and henceforth, the control of the high seas will rest in a fleet which may exercise its functions under, on and above the seas. . . .

"When we speak of defense in these days, with all the modern weapons for making war and the progress that is being made in air, land, and sea warfare, we must think of defense as something which will keep war away, keep it remote from our country, (applause) and not only keep war itself away, but if we are to conduct our affairs wisely, intelligently and effectively, we must keep away also the fear of war coming here. Instead of indulging in the fatuous folly of declaring that we will not fight when war threatens, unless our own shores are invaded, and an enemy makes a landing within our territorial limits, we must rather consistently plan to insure that the devastations of war shall be kept as remote from us as our means of defense will permit. (Applause) If we must fight, and mark this well, there will not be for many years to come a time when we may not have to fight, then with modern weapons what they are, let us determine that we will fight elsewhere than on our own soil. This seems to me a part of the very primer of National defense. . . .

Distant War Less Dangerous Than War at Home

"There are some who seem to be appalled at the thought of the dangers of a distant war. Far better a distant war, than one at home. (Applause) If we control the seas the distance is of advantage to us. The far control we exercise over the seas makes secure our own home base, so that we can move anywhere, strike anywhere, that our sea power can take us. And all these other things are added on to us—we have the advantage of initiative, we have the assurance of supplies, and we can bring to bear the economy of force. . . .

"But while we talk of building strong our defenses, especially our defense of the seas, we must avoid falling into the error of defensive thinking. France is a bitter object lesson of the folly of following of such a course. We must never get, on our part, any Maginot Line complex which would in effect throw barriers around the United States and think to be safe. This kind of thinking has proven the downfall of every nation which has tried it. The best defense has always been a swift offense, and a Navy is inherently an instrument for offensive action because of its mobility. Our purpose in having a Navy is defensive, but when it comes to fighting the Navy must always act offensively. . . .

"I hope that what I have said does make for a better understanding of how vital to us is the principle of the freedom of the seas. This freedom means that the great historic highways of the nations are free for the use of all alike, on even terms, save only those activities which are designed to be hostile and aggressive. Then it is that sea power becomes determinative and vital.

Sea Power in the Hands of Two Great Nations

"It is the hope of the world that sea power for the next hundred years, at least, will reside in the hands of the two great nations which now possess that power, the United States and Great Britain. (Applause) You may say it is a dangerous power when controlled by so few, and there is truth in that reflection. But, feeble and inadequate as may be the impulses in American and British hearts for the common good, and the advancement of civilization, and likely as it may be that this power will sometimes be abused, it is far safer thus, than if that power should be permitted to pass into hands of aggressive nations who seek their own selfish aggrandizement. (Applause).

"This is not a perfect world and to argue for perfection is foolish, but we must strive, when the life of the world itself is at stake, for the sort of peace that is available. And this, for the immediate future, unque-

tionably means that dominant sea power will be more justly and equitably employed through the joint efforts of the United States and the British Empire, than in any other way now available to us. (Applause)

Democracies Tend to Move Slowly

"Always, an autocratic aggressor has the time factor in his favor. He can determine when to act, and he can keep secret his purpose until the hour of action arrives. Democracies invariably move slowly. It is contrary to their spirit to maintain great armies; and they instinctively resist the discipline necessary for swift military action at a moment's notice. But these arguments do not apply to navies maintained by democracies for the protection of that principle. Navies never, anywhere, have subverted the freedom of the people who maintain them. And navies can be maintained in proper strength with far less effort, and with far fewer men, than is required for great armies. Properly manned and properly commanded, the Navy is always ready for instant action.

"Just as in the last war, so now, the seas have linked together the British Empire and made united effort by the Empire possible. Today, as 23 years ago, the seas join the United States and the British Empire and permit our aid to go to Britain in constantly increased proportions. Under modern mechanized conditions industrial power is a far greater factor than ever before. And we have that power; and we are harnessing it for the defeat of the Nazis. We are already sweeping the German pirates from the North Atlantic, and bringing to England the products of the arsenal we have set up here. . . .

International Law is Helpless Unless Backed by Force

"But again let me emphasize, that law, unless guaranteed by force, is helpless. Sometime, somewhere, an international order may emerge which need not rely on force, but that time, unhappily, is a long way off. In the interim, a justly conducted, peace-loving force must intervene to save the world from self-destruction. The foundation of such a force, as I have indicated, must be the control of the seas by the United States and Great Britain. Other nations of similar peaceful inclinations, and lacking in aggressive designs, could be joined to them, and thus, the beginning would be made leading toward the restoration of international law; the policing of the highways, the opening of the door of opportunity to all peoples and the achievement of a world in which war, at last, shall be abandoned as an instrument of national policy. I make no claims for this proposal as a counsel of perfection. It is an attempt, obviously, to deal with the world as we find it; with facts as they are. But of this we can be sure, that respect for law must be restored if the world is to recover and popular government is to be preserved. And the only kind of peace which is available in this present world in which we live, is the kind of peace that can, and will be, enforced through the superior power of those nations who love justice and seek after peace."

Historic Symposium on Hemispheric Solidarity

At the conclusion of Secretary Knox's address, the program of the second Assembly session took the form of a Symposium on Hemispheric Solidarity, arranged for by the Section of International and Comparative Law. Chairman John T. Vance referred again to the welcome presence of distinguished lawyers from Latin-American countries, including Dr. Enrique Gil and Dr. Victor Daniel Goytía, from the Argentine; Dr. Richard P. Momsen, of the Bar of Brazil; Dr. Mario Tagle Valdez of the Bar of Chili; and Dr. Manuel Fernandez Superveille, President of the Havana Bar Association.

"The limits of the Western Hemisphere cannot be defined by mere cartographers," declared Chairman Vance, who then said, as of Dr. Enrique Gil, the first speaker, that he "is an old friend of the United States, a real *viejo amigo*, a leader for thirty years in closer ties between North and South America, actually a pioneer of good-neighborliness, a shining star in the galaxy of Latin-American lawyers, a Doctor of both laws, for he knows the common as well as civil law systems; he represents the ideal international and comparative lawyer. He has come nearly eight thousand miles as the official representative of the Buenos Aires Bar Association, to address us."

Dr. Enrique Gil Gives the Long View of Solidarity

The distinguished lawyer from the Argentine who spoke excellent and eloquent English, first said that he wished "to express to the City of Indianapolis, to the Bar Association, to the American Bar Association, our deeply felt gratitude for having given us, the Argentine Bar Association, this marvelous opportunity to be present at this transcendental meeting today when we have heard declarations that are of world-wide importance. Personally, I wish to express my gratitude for the warm hospitality that has been bestowed on me, which I have accepted not as a personal tribute but as a tribute to my country, a tribute to this country which is so close and so friendly to the United States."

Dr. Gil's topic was "The Long View of Hemispheric Solidarity," which he treated in terms of international law and the American objectives of human freedom based on justice and opportunity under law and guaranteed rights. His address, which was often applauded by the large audience, is published elsewhere in this issue.

On motion of Chairman Vance, President Lashly directed that the credentials of the distinguished members of the foreign Bar Associations present be made a part of the records of this meeting.

The Secretary of State for Canada Brings Hearty Greetings

Chairman Vance then introduced the distinguished Secretary of State for Canada by saying:

"When the British Prime Minister so gallantly offered La Belle France in her hour of defeat a political union with Great Britain so that she might fight on, many of us prayed that she would accept that offer. We

were confident that as the descendants of the English and French had lived together so harmoniously under a common rule in Canada, so could they unite in Europe and establish the beginning of a real New Order there, based on the old French ideal, *Liberté, Egalité, et Fraternité.* Although outnumbered by their English compatriots, the French Canadians have always played a great part in the government of the Dominion. In this respect they resemble the Scotch in the Government of Great Britain.

"Our next speaker comes from that virile stock that has produced many eminent statesmen, advocates and literary and scientific figures. I have the honor to introduce a man who has been successively and successfully a member of the Canadian Parliament, Speaker of the Lower House, and now occupies the high cabinet post of Secretary of State, the Right Honorable Pierre Francois Casgrain, King's Counsel."

Canada and Hemispheric Defense

The great audience again arose and greeted the visitor with hearty applause, as he began his address on "Canada and Hemispheric Defense." He first said:

"It is my particular privilege to be able to extend to your Association and all its members the best wishes of my Canadian colleagues. It is also my most honored mission to bring to this distinguished gathering the warm greetings of a friendly neighbor and sister democracy. These sentiments are a simple acknowledgment of the transcendant services rendered by the American Bar, and, I may say, the American Courts, in constantly upholding, defending, and extending the citizen's personal liberty, as well as his political rights in the enjoyment of a fully democratic government.

"On behalf of the Government of Canada and on my own behalf, I am bringing to you a message. And this message is that we, peoples of North America, believe in the same form of liberty and justice, and that not only do we believe in these ideals, but that we also believe that one day, not far distant, they shall prevail again in the world, for the common good of humanity! (Applause).

"T. H. Green once said: 'That man is free who is conscious of himself as the author of the laws which he obeys.' The laws of a nation are but the expression of its traditions, of its principles, of its aims. They are also the transcription in its statute books of the laws that God imposed to all men, according to the oldest law book in existence in the world, the Bible.

"It is because the leaders of the totalitarian countries have become intoxicated with power, it is because they have forgotten freedom and justice, that Europe at the present time is suffering the worst epidemic known to the history of mankind. And it is because democracies still believe in law and order, in the protection of the people's right, that they will lead the way in bringing to reason the rest of the world.

Two Nations Living in Harmony

"For generations our two nations have lived in perfect harmony and constant communication. Today in the presence of a world where so many countries are trampled upon by a supremely unjust, merciless, and terroristic war, it is a comforting and inspiring thing, which cannot be too often emphasized, this spectacle of two neighboring nations shaking hands across a frontier that has seen no battle or portent of war for one hundred and twenty-five years. (Applause).

"This achievement, for such it is, must be credited to a deeper cause than the existence of boundless unoccupied territories on both sides of the line. It seems to me to rest fundamentally on the principle expressed in the Declaration of Independence, the right of the citizens to a government of their own choice. Some may say it is the result of the Monroe Doctrine. It seems to me to rest also on the plain North American common sense which has constantly upheld the idea that no international difficulty exists that cannot be solved through some peaceful agreement.

Pride in the Contribution by French-Speaking Peoples

"Coming as I do from the oldest group that forms the basis of the Canadian Confederation, I must add that we are proud to have contributed to the development not only of our country, but also of yours. How many names of French extraction, Terre Haute and Lafayette, Joliet, Marquette, and LaSalle, Fond du Lac and Vincennes, names of pioneers and discoverers, of trappers and coureurs-des-bois, are marking today, in the United States, the sites of their exploits and of their adventures.

"Reading Parkman and Bancroft is like reading novels where the heroes were persons of my blood who came here to mix it with yours. Those ancestors of yours and of mine came here seeking liberty and justice, bringing from Europe enlightenment and civilization. By some mysterious device of Providence America has become today the trustee of a civilization which seems so much forsaken and forgotten in old Europe today. Do you believe for one minute that in any other form of government than ours two races could live together, each keeping its particular traits, language, and religious practices, without any clash of importance, agreeing on the main item, loyalty to their King and their country, Canada?

"In order to resist aggression, and in order to keep for our successors the law and order which have given to Canada expansion of her trade and prosperity to her people, two years ago, alongside with Great Britain, we declared war to the German Reich. Six days after a state of war had been declared between Canada and Germany, the first group of convoyed ships to sail from Canada to Britain left an eastern Canadian port and safely reached its destination in Britain. The new world's riches were already flowing eastward to sustain the nations which had undertaken a struggle which was not theirs alone.

Canadian Devotion to British Cause

"Practically unprepared for war, because we like peace, and because

we need peace for a proper functioning of our economy, we were going into the fight with an intent purpose, the safeguarding of our integrity as a nation and the resistance against an oppressor. We knew that if England fell, through an invasion or a disruption of her defense system, the next step for the conqueror was to dictate to the rest of the world his doctrine of extortion. From your country and ours, food, supplies and munitions were sent in ever-increasing quantities. I remember that, according to your neutrality laws, the planes that you manufactured could not be delivered in Canada, but I know that along the border, familiar runways were available where our pilots could tow in bombers which England needed to defend herself against the predatory birds of Berlin.

"From every corner of Canada the young men flowed to the colors. More than 100,000 of our men are now in Great Britain serving alongside the heroic defenders of the martyred cities of England. The Canadian Army, both active and reserve, comprises about 470,000 men.

Canadian Army and Navy

"All single men and widowers without children, aged nineteen to forty-five, are by law liable for military service in Canada. At present the Canadian draft is calling up the twenty-one to twenty-four class. A large number of these men can also volunteer for Navy, Army and Air forces.

"The Navy, which started two years ago with thirteen ships and 3600 men, counts today more than three hundred ships and 17,000 men. (Applause). More than thirty million tons of material has been convoyed by the Royal Canadian Navy, in cooperation with the Royal Navy. Our coastal defense has been organized in conjunction with the United States, and we are proud of it. (Applause).

"Newfoundland, at the present time has a joint defense composed mainly of Canadians and Americans. In some of our ports you could see vessels from every country in the world except Germany and Italy. The moving frontier which surrounds America has received and is receiving the attention and protection required against the pirates and the filibusters of Hamburg and of the German-occupied ports of France.

Peace-Time Industry Has Been Put Aside

"Canada has scrapped her peacetime industry, devoting all her resources to the manufacturing of armaments from bullets to tanks. She has carried out three extensive war loans. She pays for every piece of material that she receives from the United States and she has advanced millions and millions of her own money to aid Great Britain in purchasing war material and foodstuffs. Canada spends today on war activities 45 per cent of her national income. (Applause).

Close Canadian Cooperation with the United States

"If we worked in cooperation with Britain ever since the opening of hostilities, I think I am right in saying that we also worked in complete harmony and cooperation with the United States. Since the Ogdensburg Agreement in August, 1940, the Permanent Joint Defense Board has been in operation. The Hyde Park Agreement strengthened this understanding and the United States as well as Canada have worked together in order to ensure our coasts against any possible attack. Our soldiers stand side by side with yours in Newfoundland. Canadian troops were in Iceland before American troops took over the protection of this outpost. In Greenland, Canada has been assured by the United States access to any base which your country may build.

"Americans as well as Canadians have come to realize that the fate of their country, of North America, of our hemisphere, depends on the outcome of the struggle. The knowledge that you are with us in this hour of peril is a great comfort for us and a token of victory.

"Once more, in this field of hemispheric solidarity, the United States came to the front strongly supported by the other American republics. All realized the threat to their security from foreign activities directed from outside but within their borders, well knowing that such sinister campaigns aimed at the domination of American countries. Various conferences have translated these implications into a set of defensive counteractions. The better to affirm an hemispheric solidarity, they first proclaimed their adherence to the ideal of continental democracy. To defend it, they next adopted a declaration of neutrality with a program of repressive measures against foreign activities and drew around the continent the line of a neutrality zone. In a sentiment of solidarity the American Republics agreed to lend for continental defense their maximum cooperation and support.

The Valiant Struggle Against Political Serfdom

"But, ladies and gentlemen, your President, the great leader in this continental policy, moved still further. As the world's first exponent of democratic institutions, the United States refused to rest on its oars in the race between despotism and liberty. Having still fresh in its mind Lincoln's struggle against physical slavery, it now decided to enter the fight against political serfdom.

"Mindful also of hemispheric security, it practiced the sound theory that the best defense of America was in the defeat of the enemy forces in Europe. The several measures adopted to carry this policy into execution are too well known to be enumerated. Canada is today drawing nearer and nearer to hemispheric solidarity with her ministers not only in Washington, but also now in Rio de Janeiro and Buenos Aires; and it should be added that a Canadian mission headed by a Cabinet Minister, Honorable James McKinnon, is now visiting the American Republics with a view to promoting closer contacts and better trade relations. (Applause).

High Privilege of the Peoples of the Americas

"We peoples of American countries may claim to be the favorites of nature and fortune. We all enjoy representative government aiming at a

maximum of happiness for a maximum number of citizens. We all enjoy freedom of religion, freedom of speech and social equality. Not without a touch of pride and defiance, we all breathe an unsurpassed air of liberty blowing from our limitless prairies and lofty mountains, and coming down from our pioneer ancestors, who came to this continent and toiled and fought and died, so that their children's children could live and be free. It is our supreme task now to hand on this inheritance to our children's children by insuring complete hemispheric solidarity and helping to the utmost of our power in the fight that goes on so that the world may continue its onward march on the high road of liberty and civilization.

"It is up to you, members of the American Bar Association, leaders and advisers of your communities, to lead the way and enlighten the public in order that the New World, with no desire to dictate to the old in Europe or elsewhere, should work together with Great Britain and the union of free people, to make known to dictators that their days are counted, that the writings are on the wall, and that they spell the doom of all those who have forgotten the ways of justice and liberty, respect of individuals and of nations free to work their own destinies."

The great assemblage arose in tribute to the eloquent speaker, and gave him prolonged applause.

Senator Tom Connally Continues the Symposium

Chairman Vance next presented the distinguished Chairman of the Foreign Relations Committee of the United States Senate, the Honorable Tom Connally of Texas, who was enthusiastically greeted by his many friends in the Association. The speaker declared that "hemispheric solidarity has come to have a new significance by reason of the outward pressure of this world revolution that has had the effect of cementing the nations of the Western Hemisphere into a more intimate and, I hope, a more abiding contact. (Applause).

"After all, there is no reason why the peoples of the Western World should not have common aims and common ambitions. Their sources received the same inspiration in their beginnings. The pioneers who settled this Western World, whether of Latin blood or Anglo-Saxon, came to these shores with a desire to live in a new world, to help build a new world which would have something of the impress of their own purpose, their own mind and their own ambition, and their own love for a larger share of freedom and independence than they had ever been able to achieve in the Old World.

New Aspects of the Monroe Doctrine

"The doctrine which President Monroe laid down in December 1823 was not a doctrine of imperalism; it was a doctrine that asserted independence for all of the people of the Western World. It was a doctrine that foreshadowed the situation which confronts us today, and that situation was that when Latin and South America, and the republics recently erected there, were threatened by the existence of the holy alliance in Europe and by the ambition of continental monarchies to reclaim the enfranchised and liberated regions of Central and South America, President Monroe, with the sympathy of some European countries—Great Britain, notably—laid down to the world that the United States of America would not tolerate the establishment upon this Western Hemisphere of any system of European monarchy, and that any attempt on the part of European powers to do so would be regarded by the United States as an unfriendly act, and that we should resist those aggressions with armed might if need be. (Applause).

The Bar Leads in Political Progress

"The American Bar and the Bar of our countries to the south of us have always been the leaders in political progress and in the establishment of constitutional government. Every advancement over the centuries toward the establishment of constitutions and the securing to the citizens of a larger share of freedom, independence and participation in the governments that rule over them, has been led by members of the bar. That has continued not simply during days of turmoil and strife and of war, but it has continued during the days of peace when our constitutions have been fashioned and changed and amended, and when the development of our civil institutions has taken advantage of the learning and the scholarship and the liberal policies of members of the bar.

Distinguished Service Rendered by Lawyers

"In our own country, of course, members of the Bar helped write the Declaration of Independence. They sat in the Constitutional Convention. They presided in the Courts. After the Constitution was ordained and our judicial system established, through all of the bitter struggles over the doctrines of the Constitution, the bitter contest over its construction, distinguished lawyers on either side of these controversies contributed mightily to the development of constitutional systems and parliamentary government and to the securing to the individuals of those priceless possessions, those precious privileges of personal rights and the rights of property which must exist in any free government.

"That has also been true of our brethren in the other remaining American republics, and in the Dominion of Canada. The distinguished members of their Bar have contributed mightily, not alone to the development of the institutions of their respective republics, but to international law. Some of the most prominent practitioners and scholars of international law reside in the republics south of us. They have distinguished themselves in many international conferences. During the existence of the League of Nations, some of their most distinguished jurists occupied stations of great responsibility and influence in that body.

"So the American Bar and the Bar of the American republics can make a great contribution to hemispheric

solidarity. As our relations become more intimate, we shall need more and more the counsel and the advice of our lawyers in the establishment and maintenance of commercial intercourse and the transaction of that intercourse which I trust through the years will grow. The diversion of a large portion of the business and commerce of Central and South America from Europe during this terrible period of stress and crisis must be, of course, compensated, and we hope it shall be with a larger measure of commerce and the exchange of goods with the United States." (Applause).

The United States Shall Stand by its Pledges of Aid

Senator Connally then sketched the development and use of arbitration between nations in the Western Hemisphere, and quoted extensively from the proceedings of the Havana Conference and other bodies to show the steady growth of amity and accord. After reviewing recent legislative action in the Congress of the United States, he declared:

"I voted for and advocated on the floor the reassertion a year ago in statutory form of the Monroe Doctrine as announced by President Monroe. In support of that resolution, I said that the United States would say to the Latin republics to the south of us and to the Dominion of Canada that our strength and our might and our resources of the United States are pledged to the security of this Western Hemisphere against any attack which may come either from the East or yonder in the Orient, or from Europe, upon the integrity, the soil, or the institutions of the humblest republic in all of this Western World. (Applause).

"I stand by that statement. The United States of America shall not break its pledge. It will fulfill every promise which it has solemnly made to these people. All that we ask is their cooperation in the solidarity of this hemisphere, their sharing with us the same political and constitutional ideals. When that is done, we are willing to spend our forces and spend our treasure in maintaining the integrity of this Western World. (Applause).

Need for the Two-Ocean Navy

"I have supported the two-ocean navy, and it is now in the building. That navy is not being built for conquest; it is not being constructed for the purpose of making war upon neighbors, but it is being constructed to defend ourselves, both on the East and on the West, and to defend the countries to the South if they should be attacked by a European or an Asiatic nation. I want to see that navy built as quickly as possible in order that our own safety shall be forever guaranteed. When we build that two-ocean navy, it will never be scrapped by my vote in any disarmament conference that may be held anywhere. (Applause).

"I am sure that I shall receive at least some support from the members of the Bar when I state here today that I personally favor a repeal of the restrictions and limitations upon the freedom of our own citizens and favor going back to the doctrine of freedom of the seas under international law. (Prolonged applause).

"So far as any attack is concerned, either by infiltration and the poisoning of our lives by spies and emissaries or by armed might, I trust and believe that the Western World, under our leadership (because we happen to have more resources and more power) will resist with steel tempered in our own mills any effort to conquer any foot of soil in the Western World." (Applause).

Significance of the Occasion Deeply Appreciated

The ovation which followed Senator Connally's address, and the events which ensued, showed that the great audience of the Assembly felt deeply the patriotic and historic import of what had taken place on the platform of the Association. Mr. Louis S. Cohane of Detroit moved "a vote of thanks and appreciation to our distinguished visitors and to the countries which they represent, for their fine message of friendship, cordiality and cooperation"; also, "that we give them our deep assurances and ask them to convey to their countries our complete reciprocation thereof, and our hope for a continuance of efforts toward more complete friendship and cooperation. This is not a mere gesture, but an expression of the feelings of our hearts."

This motion was adopted unanimously by the Assembly. President Lashly then acknowledged "the deep obligation which the Association has to Mr. Vance and the Section, for the arrangement and production of this fine program."

Mr. Robert Lee Tullis, of Louisiana, expressed the view "that this meeting of the American Bar Association is a great historic occasion. It is my belief that not only to the members of the bar but to laymen as well throughout the land, the proceedings of this Association should be given publicity and permanency greater than can be assured in the newspaper publications, full and appreciative as they may be."

The second session of the Assembly thereupon recessed at 12:50 o'clock.

ASSEMBLY—THIRD SESSION

The third session of the Assembly was a brilliant assemblage Wednesday evening. The speaker was Sir Norman Birkett, K.C., one of the leaders of the British Bar, whose subject was "Ties that Bind." He proved to be a gifted and moving spokesman for his people and for the Anglo-Saxon heritage of law-governed justice. His address was eagerly listened to and heartily applauded.

For its third session, the Assembly of the Association came again to the Murat Theater, where a large and brilliant audience had convened to hear the distinguished representative of the lawyers of England, Sir Norman Birkett, K.C., who had lately attended also the annual meeting of the Canadian Bar Association, held in Toronto.

ASSEMBLY—THIRD SESSION

President Lashly made a gracious introduction of the speaker, whose theme was "Ties that Bind." The audience gave the closest attention throughout, as the speaker gave a dispassionate but stirring account of the brave stand and undaunted spirit of British lawyers and people, against great odds, in their determination to save and preserve democratic institutions in Europe as well as in the rest of the world. Sir Norman's address is published in full in this issue.

The session was in every way a distinguished and memorable occasion. Upon motion of Sylvester C. Smith, Jr., of New Jersey, it was unanimously voted to be the sense of the Assembly that the speaker of the evening be made an honorary member of the Association. This action was formally made effective by the Board of Governors.

ASSEMBLY—FOURTH SESSION

Many events of importance in Association affairs were crowded into the fourth session of the Assembly. The Colorado Bar Association received the Award of Merit for outstanding and constructive work during the year. Among the larger local organizations, the Bar Association of St. Louis received the Award of Merit; among smaller organizations, the Nueces County Bar Association of Corpus Christi, Texas. The results of the voting for four Assembly Delegates were announced. The 1941 Ross Essay Bequest prize of $3,000 was bestowed on Willard Bunce Cowles of Washington, D. C. At the request of the Secretary of the Treasury, the Assembly heard a statement by his representative as to the Defense Savings Bond program. The Assembly joined with the House in rejecting the proposed increase in dues for Association membership; the Assembly adopted amendments of the Constitution and By-Laws, which had been adopted by the House. The Resolutions Committee, with Judge Sumners, of Texas, as Chairman, made its report to the Assembly at the "open forum" session. Several important resolutions within the province of the Association were adopted. Resolutions aimed against the foreign policy of the United States were rejected. Resolutions dealing with matters which have been entrusted to administration by the Committee on National Defense were referred to that committee. A resolution to create a special committee to consider the length of the term of office of a President of the United States was passed. Other resolutions were referred for study and report.

The fourth session of the Assembly, held also at Murat Theater, Thursday forenoon, transacted a great deal of Association business, with President Lashly again presiding.

First on the order of business were the awards of merit to State and local Bar Associations for outstanding work during the year. The chairman of the Committee on Awards was Morris B. Mitchell, of Minneapolis.

"The task of selecting the State and local Bar Associations which have performed the most outstanding and constructive work grows harder each year," declared Mr. Mitchell. "Not only have the applications for the Award of Merit increased each year in number and in length, but the quality of the Bar Association work as shown by these applications has steadily improved.

"Easily the most outstanding piece of work that has been done by American lawyers this year has been the National defense work in connection with giving legal aid to men in our armed forces and their families. Practically every Association which submitted an application has an active committee engaged in this work, and there has been a truly enormous amount of time and constructive effort put into this National defense work.

"Unusual public service by Bar Associations in other fields is also a noteworthy feature of this year's work, as shown by these applications. Associations in all parts of the country have not only drafted complete new and improved codes of procedural and substantive law and new rules of Court, but have successfully fought for the adoption of these codes and rules, and this often against the most determined opposition of selfish interests.

"Many of the applications contain scripts of radio programs which have been presented by the applying Bar Associations. These radio programs are no longer amateurish attempts, but they bear a professional touch which makes them compare favorably with the better radio dramatic programs presented under commercial sponsorship. These programs are designed to educate the radio public on matters relating to citizenship and the functions of Courts and lawyers.

"Also of especial interest is the work which is being done to improve the economic status of the lower income group of lawyers. Broad economic surveys of the bar have been made in several States; and following this, various employment projects, both public and private, for lawyers have been initiated. Along with these, have gone excellent post-graduation law courses to help lawyers keep abreast of the recent developments in the law and thus improve their earning power.

Specified Activities by Bar Associations Commended

"Before we make our 1941 association awards, we want especially to cite and commend the following specific outstanding and constructive bar association activities:

"CALIFORNIA STATE BAR: For a comprehensive public relations program under professional direction, to inform the public through newspapers, magazines, radio and other available media, of the many contributions to the public good by the organized legal profession and by

individual lawyers.

"Illinois State Bar Association: For stimulating local Bar Association activities through conferences of local Bar activities sponsored by the State Bar Association in each section of the state, and supplemented by publication of an excellent manual of suggested procedure for local Bar Association officers.

"Iowa State Bar Association: For securing the passage of an act granting rule-making power to the Iowa Supreme Court, this Act having been passed in the face of determined opposition.

"Bar Association of the State of Kansas: For adopting excellent uniform standards for the examination of titles.

"State Bar of Michigan: For its public service in providing press releases to all Michigan newspapers prior to the last two general elections, these releases containing short arguments prepared respectively by counsel for the proponents and counsel for the opponents of proposed constitutional amendments.

"New Jersey State Bar Association: For bringing about the establishment of and contributing substantial funds and facilities to WPA projects for needy New Jersey lawyers, which projects gave employment to such lawyers for more than 153,000 hours in such work as preparing New Jersey annotations to the Restatement of the Law, the Revised Statutes of New Jersey, and the Workmen's Compensation Act of New Jersey.

"New York State Bar Association, Detroit Bar Association and Los Angeles Bar Association: For perfecting outstanding organizations for National defense work; and the Alexandria (Louisiana) Bar Association for its excellent work in giving legal aid to soldiers in three nearby Army camps.

"Ohio State Bar Association: For producing an exceptionally fine series of radio dramatic programs under the general title 'Liberty Under Law.' These programs being subsequently transcribed and broadcast from local radio stations throughout Ohio, so as to cover every section of the State.

"Broome County Bar Association (Binghamton, N. Y.): For conducting an excellent Law Institute, attended by many of the lawyers of ten surrounding counties.

"Bronx County Bar Association (New York City): For presenting a series of weekly radio programs interpreting the United States Constitution and the American way of living, each program having an outstanding New York lawyer or judge as a speaker, and also an excellent dramatic skit prepared and acted by high school students as part of a Bar Association - sponsored competition. Arrangements were made to have all high school students listen to this program as part of their required work.

"Hennepin County Bar Association (Minneapolis, Minn.): For an outstanding monthly magazine containing Bar Association news and reports of talks on legal subjects given at the weekly Association meetings, and at the bi-weekly meetings of each of the Association's three sections.

"Indianapolis Bar Association: For establishing and sponsoring an outstanding legal aid program.

Award of Merit to the Colorado Bar Association

"We have never before had so many excellent applications from State Bar Associations. So many of them showed such outstanding work that our committee has had great difficulty in making this award. After long consideration, however, we have finally decided unanimously that the 1941 State Bar Association Award should go to the Colorado Bar Association for its outstanding services to the public and the legal profession during the past year.

"The Colorado Bar Association did fine work in many fields, but probably its two most outstanding activities were in drafting and securing the adoption of a complete new Code of Civil Procedure for Colorado, based on the new federal rules, and its work in organizing local Bar Associations affiliated with the State Bar Association in every section of the state, thereby increasing the number of members of the State Association from 350 to more than 1100.

"In addition to the foregoing accomplishments, that Association drafted a new probate code, conducted an economic survey of the Colorado Bar, organized an active National Defense Committee, published a good monthly magazine, issued a bi-weekly looseleaf service report, and had a well-balanced general program."

In behalf of the Colorado Bar Association the Award of Merit was received by the Honorable Wilbur F. Denious, of Denver, as its former President.

Award of Merit to the Bar Association of St. Louis

Mr. Mitchell then announced that "Under authority given last year by the House of Delegates, we have this year divided the local Bar Associations into two groups, and have made one award for the most outstanding work among the larger local Bar Associations and a similar award for the best work of the smaller Associations.

"Our committee has unanimously decided that the award for the most outstanding and constructive work among the larger local Associations should go to the Bar Association of St. Louis, which not only had an excellent general program but initiated and took the lead in the Statewide campaign which resulted in the adoption, at the 1940 general election, of an amendment incorporating into the Constitution of the State of Missouri a non-partisan Court plan embodying the principles which have been advocated by the American Bar Association for years.

"In the opinion of your committee this was the greatest step toward improving administration of justice which was taken in any State during the past year; and for its part in the campaign for the adoption of this amendment, we are pleased to present the 1941 Award of Merit for larger local Bar Associations to Judge Fred J. Hoffmeister as President of the Bar Association of St. Louis."

In expressing appreciation for the award, President Hoffmeister pointed out that the important work for which the recognition was bestowed had its origin when Roscoe Anderson was President of the Bar Association of St. Louis and Jacob M. Lashly was President of the Missouri Bar Association, and that the work had been continued while Roland O'Bryen was President of the St. Louis Bar Association last year. He also gave credit to the Committee, headed by Luther Ely Smith and William Crowdus of St. Louis, who devoted untiring efforts to this work.

Award to the Nueces County Bar Association of Corpus Christi, Texas

Chairman Mitchell reported also that his committee had decided unanimously that the Award of Merit for the most outstanding and constructive work among the smaller local Bar Associations should go to the Nueces County Bar Association of Corpus Christi, Texas, for an unusually active program for a small Bar Association, including a two-day course on the new Texas Rules of Civil Procedure, which course was printed and distributed to lawyers throughout Texas. He stated that this Association also did exceptional legal aid and National defense work, and secured 120 out of 150 of the Nueces County lawyers as members of that Association. The 1941 award accordingly was handed to Judge Gordon Simpson, President of the State Bar of Texas, who received it as proxy for Judge Allen Wood, President of the Nueces County Bar Association, who attempted to fly to Indianapolis but was not able to make connections to arrive in time.

President Lashly laconically observed that "The difficulty I have with that report is whatever implication the audience might obtain from the fact that the only year that I was absent from my home city, the boys got in there and won the prize!"

Greetings Sent to Former President Hogan

Louis S. Cohane, of Michigan, adverted to the fact that "one of the most eminent members of the Association," former President Frank J. Hogan, was absent because of illness. Said Mr. Cohane:

"I know of few men in the entire history of the American Bar Association who have so completely captured our deep affection and our great esteem. We miss his charm and grace of personality. We miss his geniality. We miss his friendship and his friendliness. We want him to know that we are thinking of him. His spirit permeates us, but we miss his physical presence."

Mr. Cohane moved that the Secretary be directed to send to Mr. Hogan a "message of our very deep and genuine affection, our great esteem, and our best wishes for his speedy recovery." The motion was put to a vote and unanimously carried.

Election of Four Assembly Delegates

The Secretary then announced to the Assembly the results of the tellers' count (William W. Evans, of New Jersey, Chairman) of the ballots cast on Wednesday for the election of four Assembly Delegates to the House of Delegates, each to serve for a two-year term:

Arthur T. Vanderbilt, New Jersey	281
William L. Ransom, New York	162
Lewis F. Powell, Jr., Virginia	157
Carl B. Rix, Wisconsin	133
Harry P. Lawther, Texas	131
Nathan William MacChesney, Illinois	126
Burt J. Thompson, Iowa	117
George E. Brand, Michigan	108
Bruce W. Sanborn, Minnesota	106
Eli F. Seebirt, Indiana	94
Robert Stone, Kansas	91
Robert N. Somerville, Mississippi	57
Edwin M. Otterbourg, New York	49

The four highest in the poll were thereupon declared elected.

Presentation of the Ross Bequest Prize

Next on the program was the presentation of the $3,000 prize award, under the terms of the bequest contained in the will of the late Judge Erskine M. Ross, of California, for the best essay discussing a subject in some field of law, selected by the Association for its year 1940-1941. This year the very timely subject was "The Prospective Development of International Law in the Western Hemisphere as Affected by the Monroe Doctrine." The committee which read the essays and selected the one recommended to the Board of Governors as the best was made up of former President William L. Ransom, of New York, Chairman, Mr. Justice William O. Douglas, of the Supreme Court of the United States, and Dean Joseph A. McClain, Jr., of the Washington University School of Law in St. Louis.

The 1941 winner was Willard Bunce Cowles, of Washington, D. C., who was on the platform. President Lashly handed to him the Association's certificate of his success and the Association's check for $3,000 as this year's prize. As the winning essay had been published in the June issue of the JOURNAL, Mr. Cowles read a short summary of it, and submitted some further observations as to the present-day significance of international law.

The House of Delegates had voted to approve and adopt the various amendments with certain changes in phraseology suggested by the Committee on Rules and Calendar, with the exception of an amendment to increase the annual dues of Association members, which was rejected, and an amendment in relation to the method of nominating officers of the Association, which was reserved for further study by the House Committee on Rules and Calendar. These amendments were duly published in full in the JOURNAL at the time of filing, in accordance with the requirements of the Constitution, and were adopted by the House as published, with the exception of minor phraseological changes in one or two of them. The text of the various amendments as adopted will appear in the proceedings of the House of Delegates.

Chairman Gay explained to the Assembly the nature and purpose of

the amendments, which were before the members as printed in the Advance Program pamphlet. The amendments were for the most part formal in character, to meet and provide for practical situations which experience had developed.

On motions by Chairman Gay, the Assembly severally approved and adopted the several amendments, which had been voted by the House of Delegates, and concurred in the House's rejection of the proposed increase in membership dues.

Judge Sumners Reports as Chairman of the Resolutions Committee

The Resolutions Committee, headed by Judge Hatton W. Sumners, of Texas, Chairman of the Committee on the Judiciary of the National House of Representatives, gave its report of the results of its public hearings and deliberations as to the unusually large number of resolutions offered by individual members on the opening day of the Assembly. Each resolution had been given a public hearing, with an opportunity for its sponsors and opponents to be heard.

Several of the resolutions, deemed to be within the province of the Association, were passed. Several resolutions embodying individual views were referred to Sections and Committees for consideration and report in the light of the integrated policy of the Association. Resolutions related to matters which the Association has placed in the hands of its active Committee on National Defense for administration were referred to that committee. Debate on so-called "war issues" did not develop at length; two resolutions declaring against the foreign policy of the United States were rejected as proposing activities outside of the Association's scope.

Resolution as to the Neutrality Act

Resolution Number 1, by James W. Ryan, of New York City, was as follows:

> RESOLVED, that the United States should be free from the restrictions of the so-called Neutrality Act, and that it exercise all of our national rights under treaties and international law.

For the Resolutions Committee, Chairman Sumners reported that "Your Committee recommends that this resolution be referred to the Section of International and Comparative Law, and I move that that be done."

Mr. Ryan spoke briefly to urge that the resolution presented questions of municipal law, as to restrictions imposed by the Congress on the President, and that it should be acted on at once by the Assembly, without any reference to and report by the Section. By a divided vote, recorded as 119 to 42, with many members present not voting, the motion in behalf of the Resolutions Committee was adopted.

Resolution for a Referendum as to the European War

Resolution Number 2, by Joseph T. Harrington, of Chicago, was as follows:

> WHEREAS, the citizens of the United States have repeatedly shown their desire not to engage in war in the European conflict, be it
>
> RESOLVED, that the American Bar Association take a referendum immediately of all of its members on the question of whether they favor war on land, sea, or air, without a declaration of war by Congress, as provided by the Constitution of the United States of America.

The recommendation of the Resolutions Committee was that the resolution be rejected by the Assembly, and Judge Sumners so moved. The author of the resolution was recognized to speak in favor of it.

After quoting several sentences from the context of President Lashly's address on Monday, printed elsewhere in this issue, Mr. Harrington continued:

"There is one reason I read that, and that was for this purpose: I think, and I have always thought, the American Bar Association was composed of men of such caliber that at no time in their lives would they stoop to selfish interests. Today we are interested in one thing in this country, in my estimation, and that is that our form of government shall survive; and I say that the American Bar Association should be a leader in this country.

"If Congress, if the people want to know, What about the American bar, and how do they stand on the question? there is only one way to find out, not by an Assembly meeting where only a few thousand men are in attendance, but by referendum.

"We have today between thirty and thirty-two thousand members who counsel and advise the various businessmen of the country, the lawyers who advise labor unions, who advise all people in their troubles, whether domestic or business. Should not the people have an expression from the members of our organization?

"You will notice that the Resolutions Committee made no comment as to the reason for the rejection. It reminds me of a story I once heard of a judge who said, 'Never give your reason, because you may be wrong. But if you never give your reason, then they can't argue that your reason wasn't right.'

"With all due respect to the Resolutions Committee, ladies and gentlemen, I am going to ask you to overrule their recommendation, not for the purpose of going contrary to our Constitution and By-Laws, but for the purpose of demonstrating that this organization is big enough and strong enough to find out the wishes of our members by a referendum, by a vote of each and every member."

Chairman Sumners Responds for the Committee

In behalf of the Resolutions Committee, Judge Sumners said:

"The scope of the proper activities of this Association is limited by its Constitution. The unanimous opinion, I believe it was, of the members of the Committee on Resolutions, with regard to the resolution offered by our friend, whose sincerity of purpose and whose courtesy and general attitude we appreciate, was that this resolution suggests an activity that does not come within the scope of the constitutional powers of this Association."

Mr. Thomas L. Owens, of Chicago, suggested, "that the amendment be made to the report of the committee, that it is not within the scope and powers of our Constitution, so that it will not seem that we are rejecting

it for any other reason."

Judge Sumners replied that "I do not know whether I should recognize the question as having been directed to me or not; but I assume the statement just made by the Chairman of the Committee, without attempting to enumerate the objections which individual members may have had to the subject-matter of this resolution, is correct, that it was the unanimous opinion of the members of the Committee that irrespective of whether or not we had a number of reasons, that reason obtained and was sufficient to determine the conclusions of the Committee."

President Lashly then put the motion to reject the resolution. The motion to reject was adopted, with some "noes" in opposition.

Resolution for Evidence of Overt Acts to Create a War Situation

Resolution Number 3, also by Mr. Harrington, of Chicago, was then read, as follows:

> WHEREAS, Franklin D. Roosevelt has repeatedly made statements, and as Commander-in-Chief of the Army and Navy, has issued orders that are acts of aggression against other nations which will cause a condition of war with such nations, therefore be it
>
> RESOLVED, That a Special Committee be appointed by the American Bar Association for the purpose of collecting evidence of overt acts and statements by Franklin D. Roosevelt to create a war situation, and that such Committee turn over its evidence to the U. S. Senate for the purpose of having impeachment proceedings instituted against the President of the United States."

Chairman Sumners said that:

"Your Committee recommends that this resolution be rejected, and I so move." Mr. Harrington was recognized to speak on his second resolution. He said:

Mr. Harrington Is Heard for His Resolution

"The Committee has not given the reason for its rejection, but for fear they advance the same proposition, let us take up the question of jurisdiction which I think is a good point for any lawyer to raise in opposition to a man who is trying to get some rights."

After quoting Article I of the Association's Constitution, as to its "name and object," Mr. Harrington continued:

"When I was before the Resolutions Committee, I stated—and I repeat—that the American Bar Association with its Constitution and By-Laws cannot stand unless the Constitution of the United States stands; and every encroachment upon the Constitution of the United States by the executive, legislative or judicial branch, is undermining our government.

"Monday, while Mr. Lashly was making his speech (and I wondered at the time whether we were at war), certain statements were made; and he quoted from the record of the American Bar Association in 1916, I think it was. But you will remember that in 1917 Woodrow Wilson went before Congress and made a statement of what was on, and asked them whether they would give him the right to declare war.

"Let me say to you that if you are a right and proper leader, you do not have to worry about the men in the ranks following you. However, if as a leader you are concealing from your followers the facts that you ought to know, then you cannot expect them to follow you blindly. The people elected President Roosevelt; but they elected him on one platform, that he was not going to take us into war, that there was not going to be an American Expeditionary Force.

"I want you to say, in your own minds now and in your own consciences, that the conditions which existed in November, 1940, have changed to the extent that a man must take power and usurp power given him by the people of the United States through the Constitution of the United States."

A point of order interjected by Burton Musser, of Utah, that Mr. Harrington was not discussing the Resolution Committee's motion to reject, was over-ruled by President Lashly. After reviewing several recent events, Mr. Harrington concluded by saying, most earnestly:

"I have four children, and some day in the future, when or if we lose our government through inactivity of the leaders of the bar, I will be able at least to say, 'Your daddy took his heart into this fight to try to protect America and the United States and the Constitution, which is the foundation of the United States of America'."

President Lashly then put the motion, and the rejection of the resolution was voted.

Resolution as to Rule 17 of the Rules of Civil Procedure

Vice-Chairman William G. McLaren of the Resolutions Committee presented the long resolution Number 4, by Otto Gresham of Chicago.

The resolution was preceded by a preamble and the resolution itself read as follows:

> RESOLVED, That the Bill of Rights Committee give said Gresham a hearing on his petition to enforce the Bill of Rights, especially the right to be heard on a constitutional question, and that the Honorable Hatton W. Sumners, if not inconsistent with the public interests, give us an exposition of how the equitable division of the legislative and judicial power was arrived at in interpreting Rule 17.

Vice-Chairman McLaren reported that "the recommendation of the Committee is that this resolution be referred to the Committee on the Bill of Rights." A motion to that effect was adopted without debate.

Resolution Declaring Certain Constitutional Principles, Etc.

Resolution No. 5, by Eugene Quay, of Chicago, was as follows:

> A Constitution forged in the embers of war cannot be abrogated on the plea that the emergencies of war were not foreseen by the makers of the Constitution:
>
> Our Constitution is a supreme law of the land in its entirety and under all conditions except as its own terms permit a partial suspension during invasion or rebellion.

The recommendation of the Resolutions Committee was that this resolution be referred to the Committee on National Defense.

Resolution No. 6, also by Mr. Quay of Chicago, was as follows:

> Americans responding to their government's call for military service retain all of their rights as citizens, including the rights of petition and of free speech, and these rights can be restricted to accord with war necessities *only when a state of war has been lawfully declared;* this Association should, through the officers and

committees, give all possible aid to the preservation of these rights collectively and their protection individually.

The Resolutions Committee recommended that this resolution be also referred to the Committee on National Defense. Vice-Chairman McLaren said: "It is my information that that committee is very active in trying to see to it that men being inducted into the service are protected in their civil rights."

Mr. Quay Is Heard for His Resolution

Mr. Quay was heard in support of his two resolutions. He said:

"The two resolutions contain a statement of principles which hardly require discussion of any sort before a body of lawyers. The second resolution can be divided into two parts, a statement of principle which is in effect that a man who offers his life in aid of his country in military service does not sink to some lower class. It does not call for any special privileges for him, but only an affirmation of the simple proposition that his ordinary rights as an ordinary American are not forfeited by doing his full duty as an American.

"The reason for stating that principle at this time is that a large number of Americans, the ones who are going to be asked to pay the bills which are now being incurred by us, are being called into service and are being placed under a code of military administration designed many years ago for an army that was entirely an army of professional soldiers.

"Under military rules a man cannot exercise many of his fundamental rights as a citizen and, as you all know, the recognition of the validity of those regulations was based entirely upon the proposition that one who voluntarily accepted a commission in the Army or Navy, or voluntarily adopted that as his career, waived those Constitutional rights to the extent required by the needs of the service which he voluntarily entered.

"Those regulations were not designed for an army built up as our army is being built up now, under what is in effect a conscription law. It should not be necessary for a man responding to the call for draft to protect his rights as a citizen, his right to write to his Congressman, his right to speak on public questions when not on duty or not on the military reservation. It shouldn't be necessary for him, in order to save those rights, to refuse to respond to his draft call.

"Certainly it would be contrary to the feelings of every man called to do so. The purpose of the resolution is to provide that when a man does answer that call, without opposing it, without reservation of any kind, that he still does retain those rights and that the military regulations of years ago, drawn for a small professional army, sustained on the sole ground of waiver of certain citizenship rights, have no application to the men being drafted for service today.

Mr. Quay's Resolutions Are Referred

"As to the implementing of that resolution, that, I think, can properly be referred to the Committee on National Defense, as to what action may be required from time to time to assist the men in service who find interference in exercising their rights.

"I would consequently move an amendment to the motion of the Resolutions Committee that Resolution 5 be adopted, that the statement of principle in Resolution 6 be adopted, and the remainder of the resolution as to the means of giving effect to those principles be referred to the Committee on National Defense."

Mr. Quay's amendment was seconded, put to vote, and defeated. The Resolutions Committee's motion to refer the two resolutions was therefore adopted.

Resolution of Sympathy for the Bar of Paris

Chairman Sumners reported a resolution presented by Murray M. Shoemaker, of Cincinnati, and prepared by Colonel John H. Wigmore, of Chicago. He stated that the Resolutions Committee had made some slight changes of phraseology, and recommended that the resolution be adopted in the following form:

> WHEREAS, This Association seventeen years ago was privileged to be the guest of the Bar of Paris and at a meeting in the Palace of Justice fraternized in the name of our common profession with these brethren of the bar; and
>
> WHEREAS, The historic record of the Paris bar for professional independence, learning, and courage has long inspired the admiration of professional brethren in all countries; and
>
> WHEREAS, Amidst the overwhelming disasters which the fortunes of war have brought upon their country, they find themselves now oppressed by bitter and calamitous difficulties; be it
>
> RESOLVED, That this Association records its deepest sympathy for the distressful conditions now afflicting the bar of Paris, but at the same time expresses a supreme confidence that it will once more emerge triumphantly from its time of adversity, destined to renew and to surpass that distinguished record of honor and achievement which history has indelibly preserved.

The resolution of sympathy was unanimously adopted by a rising vote.

Resolution as to Preserving Historic Freedoms

Vice-Chairman McLaren reported as to Resolution No. 8, offered by Miss Dorothy Frooks, of New York, as follows:

> WHEREAS, The force and effectiveness of our Bar Association depends on the strict adherence to the fundamental principles of our United States Constitution; and
>
> WHEREAS, Freedom of speech, the freedom of worship, the freedom of press are fundamental principles of our Constitution and good government; and
>
> WHEREAS, This country unfortunately requires greater precaution in these times from undermining our democratic system; and
>
> WHEREAS, There are saboteurs, poison-pen letter-writers, destroyers of factories and reputations by malicious propaganda; and
>
> WHEREAS, There exists an undercurrent which is endeavoring to destroy the unity of our nation by inciting religious hatred and intolerance by speech and writing against any religious group; and
>
> WHEREAS, This freedom of speech and press is not the accepted form of our American way of thinking; and
>
> WHEREAS, This nation must never be permitted to violate the trust which united this nation into greatness by the joint efforts of all religious creeds; and
>
> WHEREAS, The American Bar Association in protecting and perfecting the laws must take cognizance of the provisions of the United States Constitution; be it

RESOLVED, That the American Bar Association formulate plans of procedure to differentiate between freedom of speech and freedom of speech, likewise freedom of press and freedom of press; and be it further

RESOLVED, That the American Bar Association formulate plans of procedure for education by means of radio, public speaking and written articles to thus effectively keep our Constitution up to date as originally intended.

Miss Frooks Speaks for Her Resolution

It was the recommendation of the Resolutions Committee that this resolution be referred to the Committee on National Defense and to the Committee on American Citizenship. Vice-Chairman McLaren so moved. In explanation and support of her resolution, Miss Frooks said:

"Our Constitution has no intention of permitting free speech to set class against class and religion against religion in this country. Any person using the public platform for the purposes of creating hatred and inciting intolerance is certainly violating the fundamental principles of what America stands for. People in America have to realize that there is an undercurrent that is endeavoring to destroy factories and reputations and, in so doing are breaking down proper leadership and morale of United States citizens as well as hampering the defense work which is so imminent at this time.

"To preserve any international law it is necessary to invoke the sanctity of civilized decency in our own country. As a nation if we unite with the same thought that the forefathers of our country had, and at least in our own country make it a real home where we live and let live regardless of race, color or creed, we must preserve this thought. If freedom of speech can be defined as the late Justice Oliver Wendell Holmes defined it, "freedom for the thought we hate," then many Americans would have it abolished overnight.

"It seems that the thought is quite evident that the country, from the President down, knows the conditions that are going on and many of us here accept what we hear or read, and it is very important as long as we have the President at the head of the nation, as much as some of us don't like him, that we must stand by and remember that he knows what is going on, whereas the Senate and many of us here do not know."

It was becoming evidenced that the lateness of the hour foreclosed any further disposition to debate the subject-matter of resolutions. President Lashly asked for a vote on the adoption of the recommendation of the Committee on Resolutions, that the resolution be referred to the Special Committee on National Defense and the Standing Committee on American Citizenship. The motion to refer was adopted.

Resolution as to Contents of Insurance Policies, Etc.

Chairman Sumners made the report for the Resolutions Committee as to Resolution No. 8, presented by A. A. McKinley, of Chicago. He stated that:

"This resolution recites a number of things with regard to provisions in insurance policies, and makes the expression of judgment that people ought not to become bound by these contracts until they have made some consultation with attorneys, and so forth.

"I believe that will be a sufficient explanation in order that you may understand the reason for the recommendation made by your committee, and it is that the resolution be referred to the Section of Insurance Law and the Section of Bar Organization Activities."

This motion was seconded and carried.

Resolution Against Interference with Work on National Defense

Resolution No. 10, presented by DeVane K. Jones, of Tuscaloosa, Alabama, was reported by Chairman Sumners. It read as follows:

BE IT RESOLVED by the American Bar Association, in convention assembled at Indianapolis, on September 29th, 1941:

1. That we favor every possible effort and movement to prepare the defense of our country.

2. That we condemn the prevention of work on any project having for its purpose the furtherance of national defense and we condemn the use of violence or the threat of violence to prevent work on such projects.

3. We urge Congress to enact specific legislation making it a federal offense for any person, persons or organizations to prevent any individual or individuals from working on projects undertaken for national defense either by violence or threat of violence.

The Resolutions Committee recommended that this resolution be referred to the Committee on National Defense. This motion was adopted, without debate.

Resolution for a Junior Bar Conference in Inter-American Bar Association

Chairman Sumners reported Resolution No. 11, offered by Max M. Gilford, of Hollywood, California. He stated that the Resolutions Committee had made some slight changes of phraseology, and recommended that the resolution be adopted in the following form:

WHEREAS, The American Bar Association is vitally interested in uniting the interests of the peoples of the North and South American Republics for their mutual benefit, gain, and protection; and

WHEREAS, The American Bar Association, in the face of that policy has authorized the American bar to become affiliated with and foster the creation of the Inter-American Bar Association; now therefore, be it

RESOLVED, that to better pursue said policy of uniting the interest of the peoples of the North and South American Republics the American Bar Association approves and commends the action of the Junior Bar Conference in inviting the creation of a Junior Bar Conference of the Inter-American Bar Association.

The resolution was thereupon adopted by the Assembly.

Resolution as to Hearings on Confirmation for Judicial Office

Concerning Resolution No. 12, by Lessing Rosenthal, of Chicago, Vice-Chairman McLaren reported that:

"Without reading the lengthy resolution itself, it calls the attention of the Association to the fact that at its Kansas City Convention, September, 1937, a resolution was adopted urging upon the Senate of the United States that in all hearings on confirmation appointments for judicial office, a full public hearing be had. It is for that reason, that the committee, after reciting the language of the resolution, recommends that this resolution, which relates to an action already taken by the House of Delegates, be referred to the

Board of Governors, and I so move."

The motion so to refer Resolution No. 12 was adopted.

Resolution as to the Term of the President of the United States

An echo of last year's "open forum" session on resolutions next made an appearance, but it occasioned no stir. Chairman Sumners reported that Resolution No. 13 had been offered by Charles Ruzicka, of Baltimore, Maryland, and that various changes had been made by the Committee in the text of the resolution, so that it now read as follows:

WHEREAS, at the 1940 Annual Meeting of the Association, the Resolutions Committee recommended the adoption of a resolution reading as follows:

"RESOLVED, That this Association does hereby approve the adoption of an amendment to the Constitution of the United States so as to limit the term of the President of the United States to six years without eligibility for re-election."

and,

WHEREAS, In the Assembly debate which followed the favorable report by the Resolutions Committee of the foregoing resolution, it was the sense of the Assembly that without prejudice to bringing the subject-matter of the resolution before the Association at some future date, the resolution, because of the then-pending political campaign, could not, in 1940, be acted upon;

NOW, THEREFORE, BE IT RESOLVED, That a special committee be appointed to study the subject-matter of the Presidential term of office and report back with recommendations.

The Resolutions Committee recommended the adoption of the resolution and that the President of the Association appoint a special committee to study the subject matter of the Presidential term of office and report back with recommendations. Judge Sumner's motion to that effect was adopted.

Resolution for Association Efforts to Preserve American Institutions

A resolution which seemed to express heartily the deeply rooted sentiments of the Assembly was next reported favorably by the Resolutions Committee. Resolution No. 14, offered by Loyd Wright, of Los Angeles, California, was as follows:

WHEREAS, The subordination of any branch of our constituted form of government to any other branch is destructive to our constitutional form of government; now therefore, be it

RESOLVED, That the American Bar Association reaffirm its unalterable faith in the balanced form of government as established by the Constitution of the United States—a legislative, an executive, and a judicial branch, each independent of the others, and no one dominated by either of the others; and be it further

RESOLVED, That the American Bar Association recommends that each state, county, and local association disseminate information in their respective localities and initiate programs calculated fully to advise the citizens of their respective communities, the necessity of preserving our American institutions and our constitutional form of government.

The Resolutions Committee recommended, and Judge Sumners moved, that this resolution be adopted. The motion was carried with manifest approbation.

Resolution as to Conserving the Law Practice of Members in the Service

Resolution No. 15 came into the category of the matters which the Association has entrusted to its Committee on National Defense for administration. It had been offered by Robert R. Milam, of Jacksonville, President of the Florida Bar Association; and was as follows:

WHEREAS, Many members of the bar during the present national emergency have been and will be called into the military services of the United States; and

WHEREAS, The Congress has declared the public policy to be that those called into military service shall, whenever practicable, be restored to their former employment and associations upon their return to private life; and

WHEREAS, It is the sense of the American Bar Association that the bar as a whole has an obligation to carry out this just policy in the cases of members of the bar called into military service; now, therefore, be it

RESOLVED, That the American Bar Association herewith respectfully urges the members of the bar to assist in the conservation of practice of those members of the bar called into the military service, so far as is consistent with the welfare of the clients concerned, and to assist in the rehabilitation of the practice of such members of the bar when they are returned from the service; and further urges all state and local bar associations which have not already done so to take steps to study and deal with this problem.

Chairman Sumners reported a recommendation, and moved that the resolution be referred to the Committee on National Defense. With manifest approbation of the objectives of the resolution, the Assembly voted to adopt the motion to refer.

Concluding Business of the Session

As this completed the report of the Resolutions Committee, President Lashly declared that "the Association is under a deep sense of obligation to the Committee on Resolutions for the fine, laborious and splendid work they have done in our interest."

He announced also as the topic for the Ross Essay Prize Competition for the ensuing year the subject, "What Changes in Federal Legislation and Administration are Desirable in the Field of Labor Relations Law?"

Former President William L. Ransom, of New York, was recognized to make a motion that it was the sense of the Assembly that Dr. Enrique Gil, distinguished lawyer from the Argentine, be made an honorary member of the Association, in view of his presence at the meeting and his brilliant address. The motion was adopted. Dr. Gil's election to honorary membership was later made formally effective by the Board of Governors.

Chairman Sumners obtained the privilege of making later "some observations for consideration" as to the work of the Resolutions Committee. The fourth session of the Assembly was recessed at 12:50 o'clock.

ASSEMBLY—FIFTH SESSION

The annual meeting came to a close with a luncheon session of the Assembly. Resolutions were adopted in expression of sympathy for brethren of the Bar in distress in other lands. Thanks were heartily expressed for the diligent and agreeable hospitality of our Indianapolis and Indiana hosts. The newly elected officers and incoming members of the Board of Governors were greeted. Before introducing incoming Pres-

ident Armstrong, President Lashly paid tribute to Association workers and staffs. The new President was warmly acclaimed, and his declarations as to the duties and opportunities of the organized lawyers made a deep impression. Retiring President Lashly was given an ovation for his friendly and unremitting work during the year. The final Assembly session was adjourned, to meet next in Detroit the last week of August, 1942.

The fifth and final session of the Assembly in Indianapolis took place, according to custom, at luncheon on Friday. Although a business session, it was the climax of the Annual Meeting, and those present enjoyed themselves thoroughly.

After President Lashly rapped for order, Secretary Knight announced that the House of Delegates had also adopted the four resolutions passed by the Assembly at its "open forum" session, and that there were no disagreements between the Assembly and House on matters requiring joint action under the Association's bicameral system.

Sympathy for European Lawyers in Distress

Chairman John T. Vance, of the Section of International and Comparative Law, asked Assembly action on the following resolution, which was seconded by Ex-Judge Keaton, of Oklahoma, and unanimously adopted as the sense of the Assembly:

WHEREAS, Municipal law has been replaced in most of the continent of Europe by the *lex talionis;* and

WHEREAS, The legal profession of those nations whose sovereignty has been ruthlessly despoiled by Axis powers, has been reduced to the status of servile dependence or completely abolished, and many of our colleagues have been executed, imprisoned, or forced to seek refuge in distant lands; now, therefore, be it

RESOLVED, That the American Bar Association expresses to its European brethren in distress its profound sympathy and the hope that the day may soon come when their countries may be freed and they may be restored to their former place of trust and honor.

Resolution of Thanks to Host Association and Indiana Lawyers

Ex-Judge Crump, of California, asked for Assembly action on the following resolution, which had been adopted by the House of Delegates:

WHEREAS, The Sixty-Fourth Annual Meeting of the American Bar Association in session at Indianapolis, Indiana, during the week beginning September 29, 1941, has been one of the most interesting in its history; and

WHEREAS, The visiting members of the Association have received a most cordial and hospitable welcome; now, therefore, be it and it is hereby

RESOLVED, That the Assembly of the American Bar Association hereby expresses its gratitude to the Indiana State Bar Association, the Indianapolis Bar Association, the Lawyers Association of Indianapolis, the various entertainment committees, particularly to Mr. Joe Rand Beckett, General Chairman of the Committee on Arrangements; Mrs. Clarence R. Martin, the Chairman of the Women's Activities Committee, and the charming hostess who has presided throughout the week; to Mr. Eli Seebirt, Chairman of the Reception Committee, who did so much to make the visitors feel at home; to Mr. Albert Harvey Cole, whose cordial address of welcome was so sincerely appreciated; to the City of Indianapolis, its officials and citizens and other hosts of the American Bar Association for their cordial, generous and enjoyable hospitality; and also expresses thanks to the State Police Department for their generous escort service, the Park Board which furnished the flowers which made all functions attractive, the Indianapolis Convention Bureau, which furnished through its manager, Mr. Henry W. Davis, constant and intelligent cooperation; and also expresses appreciation to the press for the excellent publicity given the proceedings of the Association during this meeting.

At the suggestion of President Lashly, the resolution was deemed amended so as to name specifically Ex-Judge Roswell C. O'Byrne, of Brookville, President of the Indiana State Bar Association, and Harold H. Bredell, State Delegate from Indiana. A rising vote denoted the unanimous and hearty adoption of the resolution by the Assembly.

New Officers Are Introduced

President Lashly then introduced to the Assembly the newly elected officers and members of the Board of Governors, each of whom was greeted with vigorous applause. First were Ex-Judge Floyd Thompson, of Chicago; Willis Smith, of North Carolina; Morris Mitchell, of Minneapolis, and Frank W. Grinnell, of Boston, newcomers to the Board of Governors.

Next were Secretary Harry S. Knight and Treasurer John H. Voorhees, each re-elected, and Ex-Judge Guy R. Crump of Los Angeles, an active member of the House of Delegates since its founding, now its incoming chairman.

Finally President Lashly presented his successor, the Honorable Walter P. Armstrong, of Memphis, and declared that he believed it to be most fortunate, even providential, that "in this critical year" such a man, "with all his fine qualities, his eminent qualities as a lawyer, his human sympathy as a man, his veteran experience in American bar organization work," becomes now the President of the Association.

President Lashly Pays Deserved Tributes to Association Workers

In turning over to his successor the historic gavel which is "symbolic of the authority to govern for a year the American Bar Association in its deliberations," President Lashly said, with characteristic sincerity of feeling:

"As I turn it over to you, I think of some of the fine things that are implied in the delivery of this symbol. One of the fine things is the cooperation and the willingness to help of the membership and of the Committee and Section chairmen and members all over the country. One of the fine things that I can hand to you is the seasoned advice and the careful parliamentary practice and knowledge of Harry Knight, the Secretary. (Applause). He and John Voorhees, these veterans in Association work, can always be counted upon to advise you wisely and to help you, whatever your problem is. (Applause).

"And there is Joe Stecher, the younger man, Assistant Secretary. You need have no hesitation about him. And then I can turn over to you, too, but retain some for myself, that cooperation that has ripened into a real, lasting, personal friendship between the President and the Executive Secretary, Mrs. Olive Ricker. (Applause). And that fine family of young men and young

women, about twenty-five or more of them, in the Headquarters Office, our loyal cooperators, our loyal friends, so efficient and so devoted and so willing. Your problems will be theirs.

"And, sir, the Board of Governors will be your great strength and your delight—men of seasoned judgment, men of experience in the front trenches, in the battlefields of the professional world, men of strong individual opinions, strong views, but no littleness and no misunderstanding. You will rely upon them, and they will not fail you.

"And then you will become acquainted, as you already are, with the facility of the BAR ASSOCIATION JOURNAL, the editor-in-chief, and managing editor, and staff of two young ladies, especially Mrs. Child, the assistant managing editor, who has been there all these years, a splendid, cooperating force, dealing with the mouthpiece of the Association. You will enjoy them, too, and find them helpful.

"All of this goes with this gavel, as with appreciation in my heart for all that I have enjoyed of these rich things during the past year, I turn them over to you, and the gavel as their symbol. Mr. Armstrong!"

President Armstrong Responds

The assemblage arose and applauded vigorously, in affectionate demonstration for the retiring president, who had served the Association so well, and had manifested such endearing qualities of friendship and leadership throughout a trying year, and also in cordial salutation to his successor, whose long and brilliant service to the Association heralded a most successful administration of its affairs.

President Armstrong spoke feelingly in response, and then outlined his views as to the duty of lawyers and the work of the Association. By reason of its terse epigrams and striking figures of speech, as well as its forward looking outlook on the problems of the profession and the country, Mr. Armstrong's "inaugural address" attained a high quality of effectiveness. It is published in full elsewhere in this issue.

When Mr. Armstrong concluded, those present arose to emphasize their approving applause. At 2:35 o'clock the final session of the Assembly and the Annual Meeting was adjourned.

OUR ANNUAL REPORT VOLUMES

(Continued from page 687)

In faraway England, where law libraries are swept with bomb-fire, the eminent Sir Norman Birkett went to Annual Report volumes issued by the Association years ago, to find references and quotations for his American addresses. President Lashly turned back, as the JOURNAL has often done, to report volumes issued in the era of the First World War, to find analogies and opinions for the guidance of the Bar in the present crisis. In connection with the deliberations of the Resolutions Committee, resort was had to earlier report volumes, for precedents and rulings construing the scope of the Association's chartered activities as to international issues. Such material could have been found nowhere else.

A recurring difficulty has always been to find conveniently the wealth of material in these annual volumes. Unavailability or inadequacy of indices of material have been among the greatest difficulties besetting the work of all Bar Associations, for the result has been that many Committees have traveled repetitiously over the same ground, without means of finding out what others have done.

As a start toward remedying this difficulty, the Annual Report Volumes have lately included, from time to time, indices of earlier material. More noteworthy is the project of the American Association of Law Libraries, in which more than four years' work has been brought to fruition with WPA aid. The proceedings and reports of the American Bar Association, all State Bar Associations, and several City Bar Associations, and the Canadian Bar Association, covering some 2,138 volumes, have been comprehensively indexed, with a total of some 41,442 entries. The index contains also the names of more than 20,000 judges and lawyers, throughout the country, whose memorials were published in Bar Association reports. Under the sponsorship of the American Association of Law Libraries, the index has been published by Baker, Voorhis & Co., Inc. (1941). The availability of this index will greatly facilitate the convenient use of the Annual Report Volumes of the American Bar Association, for reference on all manner of subjects in the field of law, and will lead further to the treasuring of these reports in law offices and private libraries.

REPORT OF JUDICIAL CONFERENCE

THE Judicial Conference, established by Congress (U. S. C. title 28, sec. 218), convened at Washington September 23, 1941, and was in session four days. The Senior Circuit Judge from each of the circuits, together with the Chief Justice of the Court of Appeals for the District of Columbia, responded to the call of Chief Justice Harlan F. Stone. The printed report of the Conference has recently been issued and is herewith summarized for the information of the profession.

The Conference was addressed by the Attorney General with respect to sundry matters of current importance. He stated that the transfer of duties relating to the administration of justice from the Department of Justice to the Administrative Office had worked out with entire satisfaction.

Administrative Office Report

The second annual report of the Director of the Administrative Office of the United States Courts Harry P. Chandler was presented to and considered by the Judicial Conference.

In addition to its regular studies, the Administrative Office has completed two special studies: one, of the method of selecting jurors in the Southern District of New York, and the other a survey of pre-trial procedure in the Federal Courts. Special studies have also been instituted of the calendar systems in the individual districts and, in cooperation with other agencies, research is being carried on concerning the administration of the courts. The conference approved the Director's Report and ordered it released immediately for publication.

The Director reported on the state of the dockets of the Federal Courts for the fiscal year ended June 30, 1941 and compared them with previous years. His report shows that the number of civil cases pending in the district courts June 30, 1941 remained at the same level as the previous year's figure. During the year special progress was made in reducing the number of cases held under advisement for long periods of time after submission. During the period from March 1 to August 1, 1941 the number of cases under advisement for more than sixty days declined from 298 to 169. It also appeared from the report that in a considerable proportion of districts of the United States trial of cases can be had with reasonable promptness if the parties desire but in some metropolitan districts serious congestion remains despite all efforts to reduce arrears. This is attributed in part to conditions in districts where additional judges are necessary. The Judicial Conference recommended passage of legislation to authorize an additional district judge for the Eastern District of Missouri, and the repeal of the prohibition against filling the first vacancy occurring in the District of Massachusetts. Both of these recommendations had been submitted a year ago and the recommendations were again approved.

As an additional measure for the relief of congestion in the courts by mobilizing the circuit and district

(Continued on page 730)

REPORT OF JUDICIAL CONFERENCE

(Continued from page 728)

judges for services where delay and congestion manifest itself, the Conference recommended that the Senior Circuit Judge in each circuit inform the Director what judges in his circuit are available for assignment, the character of the work they are able to undertake and the length of time they are willing to devote to it, and that all requests for assignment be transmitted to the Director. His office should act as a clearing house for the information required by the judicial officer charged with the duty of affecting the assignments.

Judicial Conferences in the Circuits

The Report of the Conference shows that during the past year judicial conferences have been held in all the Circuits and in the District of Columbia. The Report says:

> These judicial conferences have already had a noticeable effect in making both the judges and the members of the bar more keenly aware of the problems affecting the administration of the courts. The Conference is of the opinion that the district judges should be more fully informed of matters which are to come before it from time to time so that such matters may become the subject of discussion at the judicial conferences in the circuits and the district judges may have opportunity to communicate their views, either through such conferences or otherwise, to this Conference.

Bill to Limit Authority of Judges to Sit

The Conference considered H. R. 138, which would "limit the authority of a circuit judge to sit in the district court, to cases where the request or consent of the senior district judge is obtained," and would also limit the authority of district judges to sit in the Circuit Court of Appeals. The bill has passed the House of Representatives and is pending before the Judiciary Committee of the Senate. After considering the bill, the Conference adopted the following resolution:

> That it is the sense of the Conference that passage of H. R. 138 is not in the public interest, and the Conference approves statements on the bill made by members of the Conference before the subcommittee of the Senate Committee on the Judiciary.

The views of the Conference were communicated to the Committee on the Judiciary of the House of Representatives.

Proposed Creation of Special Courts

The Conference decided that at the present time there was no feasible plan for working out a special court for railroad reorganization which would materially reduce the delay now incident to such proceedings.

The Conference also considered S. 928 which would establish a separate Court of Appeals with exclusive jurisdiction over appeals in patent cases. A committee of judges was appointed to study this subject and report back to the Conference at its next meeting.

Rules of Circuit Courts of Appeal

The Conference recommended that the following rule be adopted by the several Circuit Courts of Appeal:

> Where, pending appeal, application is made to the court, or a circuit judge, for any relief which might have been granted by the trial judge, such application must show either that it is not practicable to apply to the trial judge for the relief or that application has been made to him and denied, with the reasons given by him for the denial. With the application shall be filed copies of such parts of the record in the court below as are available; and timely notice of the application shall be given the opposite party or his counsel.

Federal Indeterminate Sentence Law

At its October, 1940 session, the Conference had recommended the passage of a federal indeterminate sentence law. Some opposition to the proposed bill was expressed in certain conferences in the circuits. Accordingly, the Judicial Conference

directed the Chief Justice to appoint a committee of judges to study the matter and report back at the next meeting of the Conference.

Sundry Other Matters

The Conference considered a number of other matters, including "Waiver of Indictment," "Probation Officers and Personnel in Clerks' Offices," "Abolition of Statutory Divisions of Judicial Districts and of Unnecessary Terms of Court," "Judicial Approval of Accounts," "Compensation of Attorneys," "Jury Selections," "Civil Disabilities Legislation," "Clerks' Fees," etc.

Advisory Committee

The Conference continued the Committee, consisting of the Chief Justice, Judges Biggs, Parker and Stone and Chief Justice Groner, to advise and assist the Director of the Office of Administration of the United States Courts in the exercise of his duties.

Another Sigh-Tation

By William M. Blatt
of the Boston Bar

You may have a perfect action
Brought against a cheating cad
But if you're a little early
You and your complaint are bad.
Had the notice quite expired
Ere your action first began?
No, but now 'tis time to answer
And you know the hour ran
Much beyond the notice needed
By the rule or statute law
So the parties have not suffered.
But the action has a flaw!
Never mind what sense requires,
Never mind what justice needs,
All the black-robed judge inquires
Is the dates of words and deeds.
Comes the judgment of the jurist,
"To the pure all things are pure,"
(And the oldest are the purest)
"Writ abated. Premature."

CLASSIFIED

RATES

10 cents per word for each insertion; minimum charge $1.20 payable in advance. *Copy should reach us by the 15th of the month preceding month of issue.*

BOOKS

FOR SALE THE FOLLOWING: MONTANA Reports, volumes 1-108, inclusive—Corpus Juris, volumes 1-72, inclusive—Northeastern Reporter, volumes 1-105, inclusive—Northwestern Reporter, volumes 1-250, inclusive—Federal Reporter, volumes 1-300, inclusive—Federal Reporter, second series, volumes 1-98, inclusive—Federal Digest, volumes 1-21, inclusive—United States Supreme Court Reports, volumes 1-60 inclusive with volume 50 missing—United States Supreme Court Reports Digests, volumes 1-10, inclusive—Rose's Notes of U. S. Reports, 1932 Supplement, volumes 1-4, inclusive—Rose's Notes of U. S. Reports, volumes 1-20, inclusive—Rose's Notes of U. S. Reports, revised edition, volumes 1-5, inclusive—C. F. Morris, Box 34, Capitol Post Office, Helena, Mont.

ATTORNEYS! READ AND CHUCKLE. "Idaho of Yesterday," just published. Rare photographs of 1865. Thomas Donaldson (biographer and historian) clerk of court at Boise City, Idaho Territory, in 1869 writes of courts, litigants, weird verdicts. A sage brush country 88,000 miles square and not a railroad. Stage coach days, Indians, vigilantes! Caxton Printers, Ltd., Caldwell, Idaho.

DELAWARE CHARTERS: 48-HOUR SERVice; fees moderate; submitted forms. Chas. G. Guyer, Inc., 901 Market Street, Wilmington, Del.

FOR SALE: COMPLETE SET PUBLIC UTILities Reports old and new series with digests—Box 628, Olympia, Washington.

CLEARANCE BARGAINS—FEDERAL Reporter, first series, 300 vols., sheep, complete, $175.00—Harvard Law Review, vols. 1-43, and index, buckram, $37.50—Northwestern Reporter, 1-143, with digests, very nice set, $143.00—Massachusetts Reports, 1-300 single volumes, new buckram, $325.

Fuller details gladly submitted. Williams Book Store—Since 1895. 81-87 Washington Street, Boston, Massachusetts.

HIGHEST CASH PRICES PAID FOR ACTS and laws. Pamphlets on all subjects. James Lewis Hook, 13 Snowden Road, Bala-Cynwyd, Pa.

USED LAW BOOKS BOUGHT AND SOLD. State Reports, Reporter System units, Digests, Amer. Law Reports, Text-Books, Encyclopedias, etc. Correspondence solicited. R. V. Boyle, Colcord Bldg. Oklahoma City, Okla.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write National Law Book Company, 1110—13th St. N. W., Washington, D. C.

SAMPLE COPY FREE ON REQUEST—Current Legal Thought, the lawyers' digest of law reviews. Address 261 Broadway, New York City.

LOWEST PRICES—USED LAW BOOKS complete stock on hand, sets and texts—Law Libraries appraised and bought. National Law Library Appraisal Assn., 538 S. Dearborn St. Chicago, Ill.

THE CONSTITUTION OF THE UNITED States. Handy little volume to settle arguments. 2 for 60 cents—100 for $5—1000 for $25. David Nichols Company, Kingston, Georgia.

LAW BOOKS—BOUGHT, SOLD, Exchanged. Highest Cash Prices Paid for Acts and Laws. Law Pamphlets on all subjects. Legislative Manuals, Court Rules, All States, All Dates. Central Book Company, 261 Broadway, New York City.

CHESS BOOKS, CHESS PERIODICALS, bought and sold. Free catalogues. A. Buschke, 200 Hart Boulevard, Staten Island, New York.

LAW BOOKS FOR LAWYERS, STUDENTS & Libraries, bought & sold. *Catalogues free.* Books of all publishers used and new. Many sets of reports at reasonable prices. Text & case books for students. Send for new list now ready. Giese, 337 West Madison, Chicago.

HUGHES—FEDERAL PROCEDURE—VOLS. 1-19 including 1941 Supplement—Good Condition priced for quick sale—$65.00—Box Y—ABA Journal—1140 N. Dearborn Street, Chicago, Ill.

AMERICAN MARITIME CASES—COMPLETE —newly bound—perfect condition—$375.00—Room 514—149 Broadway, New York City.

DO YOU HAVE DEAN WIGMORE'S LIST of GREAT LITERATURE FOR THE LAWYER? A copy of this and other lists of fine and rare and choice books will be sent upon application to the Argus Book Shop, Inc., 16 North Michigan Avenue, Chicago, Ill.

LAW BOOKS BOUGHT AND SOLD: Complete libraries and single sets. Clark Boardman Co., Ltd., 11 Park Place, New York City.

POSITIONS WANTED

TAX ATTORNEY UNDER THIRTY-FIVE IS seeking permanent connection with good firm in charge of its tax work. Six years Washington tax practice, one year in another location in tax practice under decentralized federal administration. Thoroughly experienced all phases of federal and state taxation including original and appellate litigation in substantial matters. Graduate of eastern university and law school. Married and with children. At present satisfactorily employed by large eastern law firm but want responsibility of whole tax department. Box HF, American Bar Association Journal, 1140 North Dearborn St., Chicago.

SECRETARY: SPEEDY, ACCURATE, THOroughly trained in high-speed legal dictation. Now employed; good reason for changing. Excellent references. L. E. Backus, c/o American Bar Association Journal, 1140 North Dearborn Street, Chicago.

PHOTO-FINISHING

35MM. (EXCEPT "MERCURY") 36 EXPOSure rolls fine grain developed and beautifully enlarged to 3" x 4", 90c. Cartridge reloaded with Eastman Plus X, 35c. Films permanently protected by revolutionary CRYOLYTE process. Fast service. Satisfaction guaranteed. Free mailing bags, sample print. Write: Technifinish Laboratory, 641 Brown St., Dept. W-11, Rochester, N. Y.

ROBES

JUDICIAL ROBES—CUSTOM TAILORED—The best of their kind—Satisfaction guaranteed—Catalog No. 41 sent on request. McCarthy & Simon, Inc., 7-9 West 36 St., New York, N. Y.

JUDICIAL ROBES, CASH PAID—WE ALSO repair and sell new ones. Lindner 425—A. 8. Seventh Ave., New York City.

MISCELLANEOUS

SPECIALIST—ATTORNEY'S STATIONERY. Send us your inquiries—Low Prices—Engraving—Prompt Service—Strathmore Bond Paper. Glennon & Kern, 538 S. Wells St., Chicago, Illinois.

ANTIQUES, INDIAN RELICS, CURIOS, Fossils—Catalogue 10c (Photographs of many). Heike, Rutland, Ill.

MISSING OR UNKNOWN HEIRS. WE search for missing or unknown heirs or legatees, as well as missing owners of dormant bank accounts, terminated trust funds, or real estate, at our own expense. Compensation expected only from persons located. Cooperation with attorneys on ethical basis. W. C. Cox & Co., Federal Reserve Bank Building, Chicago.

SAVE MONEY ON YOUR LIFE INSURance loans. Refinance your present loan or obtain a new loan at 3½%—Write Dover Agency, Inc., 84 William Street, New York.

WISH TO BUY, AS PRINCIPAL, ONE OR more year-round hotels of approximately 100 rooms in eastern coastal states. Louis Loser, 30 Broad Street, New York.

ANTIQUE FIREARMS — SEVERAL HUNdred Antique Firearms—Catalogue 10c (photographs of most). Heike, Rutland, Ill.

HANDWRITING EXPERTS

For 50 years.

Forgeries — Anonymous Letters — Ink
Typewriting — Paper — Pencil
Infra-Red and Ultra-Violet Photographs
Served in Lindbergh Kidnaping Case, Scottsboro Case, etc., etc.
J. VREELAND HARING — J. HOWARD HARING
18 Park Row, New York City
Bus. Phone, BArclay 7-8778
Res. Phone (Newark, N. J.), HUmboldt 3-2014